

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MAXIMILIAN KLEIN, ET AL., ON) C-20-08570 LHK
BEHALF OF THEMSELVES AND ALL)
OTHERS SIMILARLY SITUATED,) SAN JOSE, CALIFORNIA
)
PLAINTIFF,) JULY 15, 2021
)
VS.) PAGES 1-89
)
FACEBOOK, INC.,)
)
DEFENDANT.)
_____)

TRANSCRIPT OF ZOOM PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE CONSUMER QUINN EMANUEL URQUHART & SULLIVAN
PLAINTIFFS: BY: STEPHEN A. SWEDLOW
191 N. WACKER DRIVE, SUITE 2700
CHICAGO, ILLINOIS 60606

BY: KEVIN TERUYA
865 SOUTH FIGUEROA STREET, 10TH FLOOR
LOS ANGELES, CALIFORNIA 90017

APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

FOR THE CONSUMER
PLAINTIFFS:

HAGENS BERMAN SOBOL SHAPIRO
BY: SHANA E. SCARLETT
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LOCKRIDGE GRINDAL NAUEN
BY: BRIAN D. CLARK
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FOR THE ADVERTISER
PLAINTIFFS:

BATHAE DUNNE LLP
BY: YAVAR BATHAE
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BY: BRIAN J. DUNNE
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SCOTT & SCOTT
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FOR THE DEFENDANT:

WILMER CUTLER PICKERING HALE AND DORR
BY: SONAL N. MEHTA
950 PAGE MILL ROAD
PALO ALTO, CALIFORNIA 94303

BY: DAVID Z. GRINGER
ARI HOLTZBLATT
1875 PENNSYLVANIA AVENUE NW
WASHINGTON, D.C. 20006

KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK
BY: AARON M. PANNER
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WASHINGTON, D.C. 20036

ALSO PRESENT:

ERIC MEIRING

1 SAN JOSE, CALIFORNIA

JULY 15, 2021

2 P R O C E E D I N G S

3 (ZOOM PROCEEDINGS CONVENED AT 1:44 P.M.)

4 THE CLERK: GOOD AFTERNOON, YOUR HONOR.

5 THE COURT: GOOD AFTERNOON. I APOLOGIZE FOR BEING
6 LATE.

7 THE CLERK: CALLING CASE 20-8570, KLEIN, ET AL,
8 VERSUS FACEBOOK, INCORPORATED.

9 COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE RECORD,
10 STARTING WITH COUNSEL FOR THE CONSUMER PLAINTIFFS. THANK YOU.

11 MR. SWEDLOW: STEPHEN SWEDLOW FROM QUINN, EMANUEL FOR
12 THE CONSUMER PLAINTIFFS.

13 MS. SCARLETT: SHANA SCARLETT FROM HAGENS BERMAN FOR
14 THE CONSUMER PLAINTIFFS.

15 MR. CLARK: BRIAN CLARK FROM LOCKRIDGE GRINDAL NAUEN
16 FOR THE CONSUMER PLAINTIFFS.

17 MR. TERUYA: KEVIN TERUYA FROM QUINN, EMANUEL FOR THE
18 CONSUMER PLAINTIFFS.

19 THE CLERK: AND FOR THE ADVERTISER PLAINTIFFS?

20 MS. ANDERSON: KRISTEN ANDERSON, SCOTT & SCOTT, FOR
21 THE ADVERTISER PLAINTIFFS.

22 MR. DUNNE: BRIAN DUNNE, BATHAEE DUNNE, FOR THE
23 ADVERTISER PLAINTIFFS.

24 MR. BATHAEE: AND YAVAR BATHAEE FROM BATHAEE DUNNE
25 FOR THE ADVERTISER PLAINTIFFS.

1 THE CLERK: AND FOR DEFENDANTS.

2 MS. MEHTA: GOOD AFTERNOON, YOUR HONOR.

3 SONAL MEHTA FROM WILMER HALE ON BEHALF OF FACEBOOK. WITH
4 ME ARE AARON PANNER FROM THE KELLOGG HANSEN FIRM, DAVID GRINGER
5 FROM WILMER, HALE, AND ARI HOLTZBLATT FROM WILMER, HALE, AND WE
6 ALSO HAVE ERIC MEIRING, IN-HOUSE COUNSEL FROM FACEBOOK, WHO'S
7 ON THE LINE LISTENING IN.

8 THE COURT: ALL RIGHT. GOOD AFTERNOON AND WELCOME TO
9 EVERYONE. THANK YOU FOR PARTICIPATING.

10 I HAVE A LOT OF QUESTIONS FOR THE PARTIES, SO I APPRECIATE
11 YOUR PATIENCE IN ADVANCE.

12 LET ME FIRST START WITH THE PLAINTIFFS. I HAVE, AS YOU
13 MIGHT EXPECT, MORE QUESTIONS FOR YOU THAN FOR FACEBOOK TODAY.

14 LET'S JUST START WITH, YOU KNOW, STATUTE OF LIMITATIONS
15 TIMELINESS GROUNDS. WHY SHOULD THE COURT COME TO A DIFFERENT
16 CONCLUSION THAN JUDGE FREEMAN IN REVEAL CHAT OR JUDGE BOASBERG
17 IN THE NEW YORK AND FTC CASE, OR THE NEW YORK CASE?

18 GO AHEAD, PLEASE.

19 MR. SWEDLOW: THIS IS STEPHEN SWEDLOW.

20 CAN I TAKE THIS ON BEHALF OF THE CONSUMER PLAINTIFFS? IS
21 THAT OKAY?

22 THE COURT: THAT'S FINE. GO AHEAD, PLEASE.

23 MR. SWEDLOW: WELL, STARTING WITH I'LL SAY THE
24 GOVERNMENT CASES, THE FTC CASE, THE FUNDAMENTAL CLAIM OF
25 ANTICOMPETITIVE CONDUCT IS DIFFERENT.

1 THE CLAIM HERE IS THAT FACEBOOK MISREPRESENTED AND
2 DECEIVED THE USERS OR CONSUMERS ABOUT THE PRIVACY PROTECTION,
3 THE EXTENT AND USE OF THE DATA, THE ACCESS TO THE DATA BY THIRD
4 PARTIES, AND I THINK I'LL GET INTO WHAT THAT WRONGDOING OR
5 ALLEGED WRONGDOING WAS IN A DIFFERENT -- IN ANSWER TO A
6 DIFFERENT QUESTION.

7 BUT THIS ISN'T A MYSTERY, AND IT WAS MADE VERY CLEAR BY
8 THE FTC -- BY THE JUDGE IN THE FTC CASE, TWICE ON PAGE 6 AND 7
9 OF THE OPINION. THE COURT SAID, QUOTE, "TO BE CLEAR, ALTHOUGH
10 FACEBOOK'S DATA COLLECTION AND USE PRACTICES HAVE BEEN SUBJECT
11 TO INCREASING SCRUTINY, THEY ARE NOT THE SUBJECT OF THIS
12 ACTION."

13 SO THE FUNDAMENTAL ALLEGED ANTICOMPETITIVE BEHAVIOR IN THE
14 FTC AND THE STATE'S CASE WAS DIFFERENT THAN THE FUNDAMENTAL
15 ANTICOMPETITIVE BEHAVIOR HERE, AND WHY -- YOUR FOLLOW-UP
16 QUESTION MIGHT BE, WHY DOES THAT MATTER? YOU'RE JUST MAKING A
17 POINT.

18 BUT THE POINT IS THAT BECAUSE THAT'S THE ANTICOMPETITIVE
19 CONDUCT HERE, THE DECEPTION, WHAT THE CONSUMERS HAVE THEN PLED,
20 I THINK THE EASIEST PLACE TO FIND THAT WOULD BE IN I THINK IT'S
21 PARAGRAPH 238, IS SPECIFIC AND ACTIVE FRAUDULENT CONCEALMENT OF
22 THAT DECEPTIVE CONDUCT.

23 WHAT THE FTC AND THE STATES WERE CHALLENGING WERE
24 ACQUISITIONS THAT TOOK PLACE, LET'S SAY, EIGHT AND TEN YEARS
25 AGO, AND THOSE ACQUISITIONS, BECAUSE THEY WERE SEEKING

1 EQUITABLE RELIEF, WERE SUBJECT TO THE EQUITABLE DOCTRINE OF
2 LACHES, AND HERE WE'RE SUBJECT TO STATUTE OF LIMITATIONS.

3 THE REASON WHY THE STATUTE OF LIMITATIONS WOULDN'T BAR A
4 CLAIM IS NOT ONLY BECAUSE THERE'S ACTIVE -- OR THERE'S ACTS,
5 ANTICOMPETITIVE ACTS DURING THE STATUTE OF LIMITATIONS PERIOD,
6 BUT IT'S ALSO BECAUSE OF THE ACTIVE FRAUDULENT CONCEALMENT.

7 AND WHAT PLAINTIFFS, THE CONSUMER CLASS, DID WAS LIST, IN
8 PARAGRAPH 238, IF YOU COUNT THEM, 15 AFFIRMATIVE ACTS OF
9 CONCEALMENT. I WOULD SAY THEY ARE MORE SIGNIFICANT THAN WHAT
10 THIS COURT WAS ASSESSING IN BROWN V. GOOGLE.

11 BUT EVEN THE SIGNIFICANCE OF THE ACT OF CONCEALMENT ISN'T
12 REALLY THE SUBJECT OF REAL DEBATE BECAUSE, JUST TEMPORALLY,
13 WHAT HAPPENED WAS FACEBOOK ENTERED INTO A CONSENT DECREE IN
14 2011, WHICH WAS THEN EXECUTED IN 2012, WITH THE FTC WHERE
15 FACEBOOK DENIED ALL WRONGDOING, BUT AGREED THAT IT WOULD STOP
16 DOING CERTAIN THINGS THAT VIOLATED USERS' CONSUMER DATA PRIVACY
17 RIGHTS.

18 AND THEN THE D.O.J. SUED IN 2019 BECAUSE, UNKNOWN TO THE
19 GOVERNMENT UNTIL THE CAMBRIDGE ANALYTICA SCANDAL WAS REVEALED,
20 SO BY 2019, THE D.O.J. WAS UNAWARE THAT FACEBOOK HAD BEEN DOING
21 THE EXACT DECEPTION THAT IT HAD AGREED TO NOT DO IN THE 2011
22 CONSENT DECREE.

23 SO ONE REASON THAT THE FRAUDULENT CONCEALMENT -- THE FACTS
24 ALLEGED IN THE COMPLAINT SHOULD BE TAKEN AS TRUE, BUT THAT
25 THEY'RE ACTUALLY TRUE IS THAT THE GOVERNMENT WAS UNAWARE THAT

1 FACEBOOK WAS VIOLATING ITS OWN PROMISE TO THE GOVERNMENT TO
2 STOP ENGAGING IN DECEPTION RELATED TO USER PRIVACY AND DATA FOR
3 THOSE EIGHT YEARS FROM 2011 TO 2019, AND THE STATUTE OF
4 LIMITATIONS PERIOD STARTS IN 2015.

5 I KNOW YOU HAVE A LOT OF QUESTIONS. I'VE GOT A BUNCH OF
6 OTHER ANSWERS. I DON'T KNOW HOW MUCH YOU WANT ME TO GET INTO
7 THE OTHER ARGUMENTS.

8 THE COURT: LET ME ASK YOU JUST A FOLLOW-UP QUESTION.
9 SO YOU'RE SAYING THE DECEPTION ABOUT DATA PRACTICES WAS NOT AT
10 ALL ALLEGED AS ANTICOMPETITIVE CONDUCT IN THE OTHER CASES.

11 NOW, WHAT ABOUT THE SURVEILLANCE USING ONAVO? BECAUSE I
12 BELIEVE JUDGE FREEMAN'S ORDER AT LEAST MENTIONS ONAVO. WAS
13 THAT SORT OF ALLEGATION REGARDING ONAVO NOT BEFORE
14 JUDGE FREEMAN?

15 MR. SWEDLOW: WELL, THE -- I MEAN, I SHOULD SAY IT
16 THIS WAY: THE CLAIM WAS NOT BASED UPON THAT AS AN
17 ANTICOMPETITIVE CONDUCT.

18 BUT ONAVO IS A PRETTY EASY ONE TO DEAL WITH FOR STATUTE OF
19 LIMITATIONS, BECAUSE WHAT ONAVO WAS BEING USED FOR WASN'T KNOWN
20 UNTIL WITHIN THE STATUTE OF LIMITATIONS PERIOD. SO WHILE IT
21 MAY HAVE BEEN, AND OUR ALLEGATION IS, THAT IT WAS USED FOR
22 PURPOSES OF DETERMINING WHICH ACQUISITIONS TO ENTER INTO AND
23 WHICH NOT -- AND THIS ISN'T THAT COMPLICATED A STRUCTURE. WHAT
24 FACEBOOK WAS DOING WAS USING THE DATA OF ITS USERS TO
25 DETERMINE, WHERE WERE THOSE USERS GOING WHEN THEY WEREN'T ON

1 FACEBOOK?

2 SO WE CAN TAKE INSTAGRAM, FOR EXAMPLE. IF FACEBOOK IS
3 ABLE TO MONITOR IN A DECEPTIVE WAY WHAT USERS DO WHEN THEY'RE
4 NOT ON FACEBOOK AND HOW LONG THEY'VE BEEN USING SOME OTHER APP
5 THAT'S IN SOCIAL MEDIA BUT HASN'T RISEN TO A SOCIAL NETWORK
6 PLATFORM, THEN FACEBOOK COULD USE THAT DATA TO EITHER DECIDE TO
7 ACQUIRE OR NOT ACQUIRE A POTENTIAL COMPETITOR.

8 AND THAT WASN'T KNOWN WHAT ONAVO AND ITS SUCCESSORS WERE
9 BEING USED FOR UNTIL WITHIN THE LIMITATIONS PERIOD.

10 SO IT ISN'T THAT NONE OF THE FACTS THAT WE ALLEGE OVERLAP.
11 IT'S JUST THAT THE ANTICOMPETITIVE CONDUCT DOES NOT.

12 THE COURT: WELL, WHAT I'M TRYING TO DO IS JUST TO
13 NARROW, WHAT ARE THE BUCKETS OF ANTICOMPETITIVE CONDUCT YOU'RE
14 ALLEGING? SO THAT WAS THE POINT OF MY QUESTION.

15 MR. SWEDLOW: OKAY.

16 THE COURT: IT LOOKS LIKE, FROM THE CONSUMER
17 COMPLAINT, YOU HAVE THREE BUCKETS OF ANTICOMPETITIVE CONDUCT:
18 ONE IS THE DECEPTION ABOUT DATA PRACTICES; ANOTHER SEEMS TO BE
19 THE SURVEILLANCE USING ONAVO; AND THEN THE THIRD ONE SEEMS TO
20 BE USING THE DATA TO IDENTIFY AND ACQUIRE COMPETITIVE THREATS.

21 WOULD YOU THINK THOSE ARE THE BUCKETS OF ANTICOMPETITIVE
22 CONDUCT THAT YOUR CLIENTS ARE ALLEGING?

23 MR. SWEDLOW: I WOULD -- I WOULD ONLY DISAGREE WITH
24 YOU TO THIS EXTENT: I THINK IT'S ONE BIG BUCKET, THE DECEPTION
25 RELATING TO DATA PRACTICES AND USE OF DATA, UNAUTHORIZED OR

1 MISAPPROPRIATED USE OF DATA, AND THERE ARE CERTAIN METHODS OF
2 THAT THAT WERE IMPLEMENTED. SO THE ACQUISITIONS WERE A METHOD
3 WHERE UNAUTHORIZED DATA WAS USED, BUT I WOULDN'T SAY IT'S A
4 SEPARATE BUCKET.

5 THE PRIMARY BUCKET IS THAT USERS WERE DECEIVED ABOUT WHAT
6 DATA WAS GOING TO BE HARVESTED AND HOW THAT DATA WOULD BE USED,
7 WHETHER IT BE SOLD TO THIRD PARTIES, CAMBRIDGE ANALYTICA, USED
8 BY THIRD PARTIES IN A NON-AUTHORIZED WAY, OR USED BY FACEBOOK
9 TO DECIDE WHETHER OR NOT TO ACQUIRE A DIFFERENT SOCIAL MEDIA
10 COMPANY.

11 THE COURT: ALL RIGHT.

12 MR. SWEDLOW: GO AHEAD. SORRY.

13 THE COURT: SO YOU'RE SAYING YOU'LL HAVE THE FACTS IN
14 YOUR COMPLAINT BECAUSE THEY'RE THE METHODS, AND SO TO THAT
15 EXTENT, THE METHODS MIGHT ALSO BE IN THE COMPLAINTS BEFORE THE
16 OTHER JUDGES. BUT YOUR OVERALL ALLEGATION OR THEORY IS
17 DIFFERENT. IS THAT RIGHT?

18 MR. SWEDLOW: YES. THE PRIMARY FUNDAMENTAL
19 ANTICOMPETITIVE BEHAVIOR IS THE DECEPTION. THAT DECEPTION WAS
20 USED TO DECIDE WHETHER OR NOT TO ACQUIRE A POTENTIAL
21 COMPETITOR.

22 THE GOVERNMENT'S COMPLAINTS WERE BASED UPON THE
23 ACQUISITION ACTIVITY, NOT THE DECEPTION.

24 AND LUCKILY -- I MEAN, I GUESS UNLUCKILY FOR THE
25 GOVERNMENT AT THE MOMENT, BUT LUCKILY FOR US, THE JUDGE WAS

1 VERY CLEAR THAT THE, THE DATA USE AND COLLECTION AND PRACTICES
2 ARE NOT THE SUBJECT OF THAT ACTION.

3 SO WHAT I WOULD SAY IS THAT THEY MAY BECOME THE SUBJECT OF
4 THAT ACTION BECAUSE THE FTC WAS GIVEN LEAVE TO AMEND I THINK UP
5 UNTIL JULY 29TH.

6 THE COURT: UM-HUM.

7 MR. SWEDLOW: AND THE GOVERNMENT MAY CHOOSE TO AMEND
8 THEIR COMPLAINT AND ADD ALLEGATIONS THAT THE DATA USE AND
9 PRACTICES WERE THE DECEPTIVE ACT THAT CONSTITUTE THE
10 ANTICOMPETITIVE BEHAVIOR.

11 THE COURT: OKAY. LET ME GO TO THE ADVERTISER
12 COMPLAINT, BECAUSE IT DOES SEEM LIKE YOUR COMPLAINT IS MORE
13 SIMILAR TO THE CASES BEFORE THE OTHER JUDGES. CERTAINLY USING
14 THE PLATFORM TO DESTROY COMPETITION, WHICH IS ONE OF YOUR
15 ALLEGATIONS, SEEMS, YOU KNOW, VERY MUCH LIKE WHAT WAS BEFORE
16 OTHER COURTS.

17 YOU -- I MEAN, I DON'T -- IT DOESN'T -- I DON'T BELIEVE
18 THAT THE JEDI BLUE, THE AGREEMENT WITH GOOGLE, WAS BEFORE THE
19 OTHER COURTS. IS THAT CORRECT?

20 I'M JUST TRYING TO GET A SENSE OF WHERE ARE YOU THE SAME
21 AND WHERE ARE YOU DIFFERENT AS THE PLAINTIFFS IN REVEAL CHAT
22 AND THEN EITHER STATE OF NEW YORK, THE STATE ATTORNEY GENERALS,
23 OR FTC.

24 MR. BATHAEE: YOUR HONOR, THAT'S CORRECT. THE
25 JEDI BLUE ALLEGATIONS ARE NOT IN THE REVEAL COMPLAINT. NEITHER

1 IS THE 2000 TO -- 2016 TO 2018 CONTINUATION OF THE PLATFORM
2 MANIPULATION WHICH WE ALLEGE IN THE COMPLAINT.

3 OTHERWISE THE UNDERLYING ACTS ARE LARGELY THE SAME, BUT
4 FROM A DIFFERENT PERSPECTIVE, FROM THE PERSPECTIVE OF THE
5 ADVERTISERS.

6 AND FOR STATUTE OF LIMITATIONS PURPOSES, YOUR HONOR,
7 THAT'S ACTUALLY QUITE CRITICAL TO JUDGE FREEMAN'S OPINION.

8 BUT OVERALL, YOUR HONOR, I CAN SUMMARIZE THIS POINT, WHICH
9 IS THAT JUDGE FREEMAN'S DECISION FROM THAT SECOND REVEAL
10 OPINION WAS PREMISED ON THIS: THAT THE DEVELOPERS -- AND THAT
11 CASE INVOLVED DEVELOPERS, IT'S A COMPETITOR SUIT -- WHO WERE
12 DRIVEN OFF THE PLATFORM KNEW THEY WERE INJURED AND, THEREFORE,
13 AS A MATTER OF LAW, IT'S CONSTRUCTIVE KNOWLEDGE OF THEIR CAUSE
14 OF ACTION.

15 NOW, THERE ARE SEVERAL ISSUES WITH THAT, BUT WE DON'T HAVE
16 TO TAKE THEM UP IMMEDIATELY. I CAN EXPLAIN WHY JUDGE FREEMAN
17 HERSELF DIFFERENTIATED THIS CASE, AND THIS IS AT REVEAL CHAT
18 HOLDCO 202021 WESTLAW 1615349 AT STAR 7.

19 THE COURT AGREED WITH FACEBOOK'S ARGUMENT DISTINGUISHING
20 ANIMATION WORKERS II AND GLUMETZA AND SAYS, "AS FACEBOOK NOTES,
21 THESE CASES INVOLVE ALLEGATIONS OF ILLEGAL PRICE-FIXING, A
22 DIFFERENT ANTITRUST VIOLATION THAN WHAT PLAINTIFFS HAVE ALLEGED
23 HERE. BOTH CASES ALLEGE A CONSPIRACY, WHICH IS ALSO ABSENT IN
24 THIS CASE. THESE DIFFERENT FACTUAL SCENARIOS ARE MEANINGFUL IN
25 TERMS OF EVALUATING WHETHER PLAINTIFFS HAVE SUFFICIENTLY PLED

1 FRAUDULENT CONCEALMENT."

2 AND THEN SHE GOES ON, AND THIS PART IS ACTUALLY QUOTED
3 FROM FACEBOOK'S BRIEF. "THE COURT AGREES WITH FACEBOOK THAT
4 'IN A PRICE-FIXING CASE, CONCEALING THE REASONS A PRICE IS SET
5 AT A GIVEN LEVEL OBSCURES NOT ONLY THE DEFENDANT'S INTENT BUT
6 ALSO THE FACT THAT A POTENTIAL PLAINTIFF HAS BEEN INJURED AT
7 ALL, THAT PRICES ARE THE RESULT OF COLLUSION RATHER THAN MARKET
8 FORCE.'"

9 NOW, OF COURSE, THIS ISN'T ENTIRELY AN AGREEMENT-BASED
10 SCHEME. WE THINK JEDI BLUE IS, OF COURSE.

11 BUT THE SAME CONCEPT APPLIES. WHEN YOU PAY AN INFLATED
12 ADVERTISING PRICE, YOU DON'T KNOW WHY YOU PAID THAT INFLATED
13 PRICE. YOU DON'T KNOW THAT IT'S A RESULT OF ANTICOMPETITIVE
14 CONDUCT. WHEREAS IF YOU ARE A COMPETITOR THAT HAS BEEN THROWN
15 OFF FACEBOOK'S PLATFORM, ARGUABLY YOU IMMEDIATELY KNOW YOU'RE
16 INJURED.

17 NOW, THAT OPINION, YOUR HONOR, IS CURRENTLY BEFORE THE
18 NINTH CIRCUIT. MY FIRM IS COUNSEL OF RECORD.

19 AND WE TAKE ISSUE WITH THE NOTION THAT INJURY AND CAUSE OF
20 ACTION ARE THE SAME IN REFUSAL TO DEAL CASES, BECAUSE AS CONMAR
21 HAS HELD AND OTHER CASES, INCLUDING THE EXCELLENT E.W. FRENCH,
22 FRAUDULENT CONCEALMENT IS FOCUSSED ON THE CAUSE OF ACTION, NOT
23 THE INJURY.

24 AND AS YOUR HONOR KNOWS, REFUSAL TO DEAL, 99.99 PERCENT OF
25 THEM ARE NOT ACTIONABLE. YOU HAVE TO PLEAD YOUR WAY THROUGH A

1 VERY NARROW NEEDLE, INCLUDING LACK OF BUSINESS JUSTIFICATION,
2 PROFIT SACRIFICE, TERMINATION INVOLUNTARILY -- INVOLUNTARY
3 TERMINATION AND PROFITABLE RELATIONSHIP.

4 SO THE NOTION THAT MERE INJURY WAS TANTAMOUNT TO
5 CONSTRUCTIVE KNOWLEDGE OF A CAUSE OF ACTION, YOU KNOW, WE DON'T
6 THINK IS CORRECT.

7 BUT EVEN IF YOU ACCEPT THAT, THAT'S NOT THE CASE HERE.
8 IT'S ACTUALLY QUITE IMPOSSIBLE FOR AN AD PURCHASER, WHEN HE
9 PAYS AN INFLATED PRICE, TO KNOW, OH, WELL, THAT'S BECAUSE THE
10 DATA TARGETING BARRIER TO ENTRY WAS REENFORCED AND THERE WAS NO
11 COMPETITIVE PRICE CHECK BECAUSE OF ANTICOMPETITIVE CONDUCT.

12 AND THAT'S WHY FRAUDULENT CONCEALMENT I THINK, YOUR HONOR,
13 IS MUCH STRONGER HERE THAN IT WAS EVEN UNDER JUDGE FREEMAN'S
14 OWN OPINION.

15 AND, YOUR HONOR, I DO WANT TO NOTE ON THIS POINT --

16 THE COURT: WELL, I GUESS I'M -- I GUESS I'M STILL
17 NOT CLEAR. I MEAN, JUDGE FREEMAN SAID IT DOESN'T MATTER
18 WHETHER YOU KNOW WHAT FACEBOOK'S MOTIVATION WAS FOR ITS, YOU
19 KNOW, PLATFORM POLICY CHANGE. YOU JUST KNOW THAT THE PLATFORM
20 POLICY DID CHANGE BACK IN 2015. SO IF THAT WAS TRUE OF APP
21 DEVELOPERS, I'M NOT SURE WHY THAT WOULDN'T BE TRUE FOR
22 ADVERTISERS.

23 MR. BATHAE: WELL, YOUR HONOR, SHE SAYS SO HERSELF,
24 BECAUSE WHEN YOU PAY AN INFLATED PRICE, YOU DON'T NECESSARILY
25 KNOW WHY, RIGHT?

1 BUT WHEN YOU'RE THROWN OFF A PLATFORM AND YOU'RE INJURED
2 AND YOU NOW KNOW YOUR BUSINESS CAN'T CONTINUE BECAUSE YOU'VE
3 LOST ACCESS TO KEY FEATURES IN YOUR SOFTWARE, YOU KNOW
4 IMMEDIATELY YOU'RE INJURED.

5 NOW, EVEN SO, YOUR HONOR, WE DON'T THINK THAT'S CONSISTENT
6 WITH CONMAR, HEXCEL, OR E.W. FRENCH, BECAUSE BEING INJURED FROM
7 REFUSAL TO DEAL DOES NOT MEAN YOU HAVE A CAUSE OF ACTION. YOU
8 CAN'T GO AND PLEAD A REFUSAL TO DEAL CLAIM THE NEXT DAY JUST
9 BECAUSE YOU WERE THROWN OFF FACEBOOK'S PLATFORM. FOR ALL YOU
10 KNOW, IT'S LEGAL.

11 AND SO WHEN FACEBOOK THEN PUSHES PRETEXT, WHICH WE ALLEGE
12 WITH PARTICULARITY IN OUR COMPLAINT, THE WHO, WHAT, WHERE, AND
13 WHEN, WE ALLEGE THEY PITCHED PRETEXT, THAT IT WAS DONE FOR USER
14 PRIVACY REASONS, AND THAT PRETEXT TURNS OUT TO BE FALSE AND
15 IT'S REVEALED TO BE FALSE IN NOVEMBER 2019 FOR THE FIRST TIME,
16 THAT'S THE FIRST TIME YOU CAN FIGURE OUT, WELL, IF I PAID AN
17 INFLATED PRICE, WELL, IT MUST HAVE BEEN FOR THAT REASON. YOU
18 CAN ACTUALLY TELL THAT YOU MIGHT HAVE A CLAIM.

19 BUT YOU COULDN'T WALK IN AND PLEAD A CLAIM BASED ON THAT
20 REFUSAL TO DEAL JUST BECAUSE YOU'RE INJURED BY AN INFLATED
21 PRICE. THERE'S A DISCONNECT THERE. IT DOESN'T NATURALLY
22 FOLLOW THAT YOUR INFLATED PRICE IS FROM THE PLATFORM CONDUCT.

23 BUT EVEN SO, YOUR HONOR, I COULD NOT FIND A SINGLE CASE,
24 OTHER THAN JUDGE FREEMAN'S DECISION, FINDING AT A MOTION TO
25 DISMISS AS A MATTER OF LAW THAT SOMEONE HAD CONSTRUCTIVE

1 KNOWLEDGE OF A CLAIM FOR FRAUDULENT CONCEALMENT PURPOSES.

2 HEXCEL WAS THE ONLY ONE WHERE WE FOUND FACTS SUFFICIENT TO
3 BAR A CLAIM, AND THAT WAS ON SUMMARY JUDGMENT AFTER A MOTION TO
4 DISMISS HAD BEEN DENIED AND THE PERSON PARTICIPATED IN THE
5 ANTICOMPETITIVE SCHEME.

6 CONMAR AND E.W. FRENCH, POST-TRIAL, SUMMARY JUDGMENT.
7 ALMOST EVERY DISTRICT COURT, INCLUDING SEVERAL OPINIONS FROM
8 YOUR HONOR, WOULD NOT DECIDE CONSTRUCTIVE KNOWLEDGE OF A CLAIM
9 AS A MATTER OF LAW, AND WE THINK IT PROBABLY WAS A MISTAKE IN
10 REVEAL, BUT IT'S DEFINITELY A MISTAKE HERE WHEN ALL YOU'VE DONE
11 IS PAID AN INFLATED PRICE.

12 SO IN ORDER TO FOLLOW JUDGE FREEMAN, YOUR HONOR WOULD HAVE
13 TO FIND CONSTRUCTIVE KNOWLEDGE OF A CLAIM AT THE MOTION TO
14 DISMISS PHASE, WHICH I THINK THE NINTH CIRCUIT HAS ADMONISHED
15 AGAINST IN CONMAR AND YOUR HONOR AGAIN IN HEXCEL ITSELF.

16 BUT HEXCEL IS A VERY SPECIAL CASE AS I MENTIONED.

17 YOUR HONOR, DISTRICT COURTS -- THERE'S, OF COURSE, CAVE
18 CONSULTING IN THE NORTHERN DISTRICT OF CALIFORNIA. THERE'S THE
19 GARCIA CASE, IN RE: IMMIGRATION WORKERS AND SEVERAL OTHERS, IN
20 RE: PETROLEUM, WHERE THE THEME IS, LOOK, IF THERE'S ANY SHRED
21 OF FACTS THAT COULD GO THE OTHER WAY, YOU CAN'T FIND AS A
22 MATTER OF LAW THAT SOMEONE HAS CONSTRUCTIVE KNOWLEDGE OF THEIR
23 CLAIM. THAT'S A FACT QUESTION FOR A JURY.

24 AND EVEN -- EVEN I THINK JUDGE TASHIMA IN THE PETROLEUM
25 PRODUCTS CASE SAID, WELL, EVEN WHEN THE FACTS WERE UNDISPUTED,

1 THE INFERENCES WERE FOR THE JURY.

2 SO IT WOULD BE QUITE RADICAL TO SAY, JUST BECAUSE YOU PAID
3 A VERY HIGH PRICE, AND YOU DON'T KNOW WHY, YOU DON'T EVEN KNOW
4 MAYBE THAT YOU PAID A HIGH PRICE OR AN INFLATED PRICE, WELL,
5 YOU'RE AUTOMATICALLY ON NOTICE, ON NOTICE THAT YOU HAVE A CLAIM
6 BASED ON, AMONG OTHER THINGS BECAUSE WE HAVE OTHER THINGS, A
7 REFUSAL TO DEAL.

8 AND SO JUDGE FREEMAN LEFT ROOM FOR THAT. THERE'S DAYLIGHT
9 IN HER OPINION, EVEN IF YOU ACCEPT THE NOTION THAT THOSE
10 PLAINTIFFS HAD CONSTRUCTIVE KNOWLEDGE OF THE SCHEME.

11 THE COURT: I'D LIKE YOU TO WRAP UP SO I CAN GO -- I
12 HAVE A LOT OF QUESTIONS, SO I'M GOING TO NEED EVERYONE TO
13 PLEASE KEEP THEIR ANSWERS RELATIVELY SHORT. I'LL GIVE YOU A
14 SECOND TO WRAP UP.

15 MR. BATHAE: THAT'S IT, YOUR HONOR. I WON'T BELABOR
16 IT.

17 THE COURT: OKAY. THANK YOU.

18 ALL RIGHT. I'D LIKE TO ASK SOME MORE SPECIFIC QUESTIONS
19 ON THE TIME BAR ISSUE.

20 SO LET'S HANDLE CONTINUING VIOLATION FIRST.

21 WHAT ARE EACH PARTY'S BEST CASES ON THE NEW AND
22 INDEPENDENT ACTS ISSUE, WHETHER THEY'VE CAUSED NEW AND
23 ACCUMULATING INJURY TO THE PLAINTIFFS SINCE DECEMBER 2016?
24 HERE I WOULD JUST LIKE A LIST OF CASES. I CAN CERTAINLY GO
25 BACK AND LOOK AT THEM, SO I DON'T NEED ANY SUMMARY OF WHAT THEY

1 SAY.

2 BUT LET'S START WITH THE CONSUMER PLAINTIFFS. WHAT ARE
3 YOUR BEST CASES ON CONTINUING VIOLATION?

4 MR. SWEDLOW: AND THIS IS NOT PANDERING, BUT OUR BEST
5 CASE IS YOUR CASE, FREE FREEHAND FROM 2012; I WOULD SAY THAT
6 THE NINTH CIRCUIT CASE, SAMSUNG ELECTRONICS V. PANASONIC,
7 747 F.3D 1199, THE RELEVANT DISCUSSION IS AT 1203 AND -04; AND
8 A SEVENTH CIRCUIT CASE, XECHEM VERSUS BRISTOL-MYERS SQUIBB,
9 WHICH IS 372 F.3D 899, AND THE RELEVANT DISCUSSION IS AT 902.

10 THE COURT: ALL RIGHT. THANK YOU.

11 LET ME ASK THE ADVERTISER PLAINTIFFS, AND THEN WE'LL GO TO
12 FACEBOOK.

13 GO AHEAD, PLEASE.

14 MR. BATHAEE: WE JOIN IN THOSE CASES. I'D LIKE TO
15 ADD IN RE: GLUMETZA ANTITRUST LITIGATION AT 2020 WESTLAW
16 1066934 AT STAR 6.

17 THE COURT: AND I'M SORRY, I COULDN'T HEAR YOU. IN
18 RE: -- WHAT WAS IT?

19 MR. BATHAEE: I'M SORRY, YOUR HONOR. GLUMETZA
20 ANTITRUST LITIGATION, GLUMETZA, G-L-U-M-E-T-Z-A.

21 THE COURT: OKAY, THANK YOU.

22 ALL RIGHT. LET ME GO TO FACEBOOK. WHAT ARE YOUR BEST
23 CASES ON CONTINUING VIOLATION?

24 MS. MEHTA: THANK YOU, YOUR HONOR.

25 I DON'T THINK IT'LL SURPRISE YOU TO HEAR THE NEW YORK

1 STATE A.G. CASE BY JUDGE BOASBERG; JUDGE FREEMAN'S DECISION IN
2 THE REVEAL CHAT CASE; THE GARRISON CASE THAT YOUR HONOR IS VERY
3 FAMILIAR WITH; PACE FROM THE NINTH CIRCUIT; AND THE BAY AREA
4 SURGICAL CASE THAT'S ALSO CITED IN OUR BRIEFING.

5 THE COURT: ALL RIGHT. GARRISON BEING MY CASE WITH
6 ORACLE; CORRECT?

7 MS. MEHTA: THAT'S CORRECT, YOUR HONOR.

8 THE COURT: OKAY. ALL RIGHT. THANK YOU ALL FOR
9 THAT.

10 LET ME GO TO PLAINTIFFS WITH TWO QUESTIONS AND THEN I'LL
11 GO TO THE DEFENDANTS WITH A QUESTION JUST ON CONTINUING
12 VIOLATION, AND THEN WE'LL GO TO FRAUDULENT CONCEALMENT.

13 SO ON THE NEW AND INDEPENDENT ACTS FOR THE CONTINUING
14 VIOLATION DOCTRINE, IT SEEMS LIKE YOUR ALLEGATIONS ARE
15 BASICALLY CONTINUATIONS OF CONDUCT THAT OCCURRED BEFORE
16 DECEMBER 2016. SO I GUESS MY QUESTION IS, HOW CAN THESE BE NEW
17 AND INDEPENDENT?

18 AND I WOULD -- AND I GUESS I WOULD PUT IN THOSE BUCKETS OF
19 CONTINUING CONDUCT, I WOULD PUT IN OBTAINING THE, YOU KNOW,
20 USER DATA THROUGH ONAVO, THE ALLEGED DECEPTION REGARDING THE
21 PRIVACY PRACTICES, AND THE PLATFORM MANIPULATION.

22 IF THOSE ARE ALL CONTINUATIONS THAT HAPPENED BEFORE
23 DECEMBER 2016, HOW ARE THEY NEW AND INDEPENDENT AFTER DECEMBER
24 2016? WHO WANTS TO TAKE THAT?

25 MR. SWEDLOW: I'LL TAKE PART OF THAT FOR THE

1 CONSUMERS. THE PLATFORM IS NOT REALLY PART OF OUR CLAIM, SO
2 I'M GOING TO LEAVE THAT FOR THE ADVERTISERS.

3 THE DISTINCTION I WOULD MAKE HERE WHEN WE'RE TALKING ABOUT
4 SECTION 2 VERSUS SECTION 7 -- IT'S NOT A MERGER AND ACQUISITION
5 CLAIM -- THE DISTINCTION IS THAT THERE WAS -- THERE IS, IN
6 FACT, NEW CONDUCT THAT'S CONSISTENT WITH THE SAME
7 ANTICOMPETITIVE COURSE OF CONDUCT OR STRATEGY, AND SO EACH ACT
8 IS AN INDEPENDENT ACT. IT DOESN'T INDIVIDUALLY HAVE TO GIVE
9 RISE TO ANTITRUST LIABILITY, ALTHOUGH IT COULD.

10 BUT THE ARGUMENT -- AND THE ARGUMENT THAT FACEBOOK IS
11 PRESSING IN THIS CONTEXT FOR SAYING THAT IT'S NOT A CONTINUING
12 VIOLATION IS THAT EVEN THOUGH IT WAS DISCOVERED AND CONTINUES
13 INTO THE LIMITATIONS PERIOD -- IN OTHER WORDS, THE CONSUMER
14 CLASS DID NOT AND COULD NOT KNOW THAT THE CONDUCT HAD CONTINUED
15 INTO THE LIMITATIONS PERIOD -- BECAUSE IT ALSO OCCURRED BEFORE
16 THE LIMITATIONS PERIOD, IT SHOULD BE BARRED BY THE STATUTE OF
17 LIMITATIONS.

18 AND THAT SIMPLY DOESN'T MAKE ANY SENSE. THE CONDUCT, THE
19 DECEPTIVE CONDUCT FOR HARVESTING AND USE OF DATA ALMOST -- I
20 MEAN, WE'LL TAKE THE ALLEGATIONS AS TRUE, BUT IT IS ACTUALLY
21 TRUE, CONTINUES PAST DECEMBER 2016, AND IT ALSO EXISTED AS A
22 COURSE OF CONDUCT THAT -- I DON'T WANT TO SWITCH TO FRAUDULENT
23 CONCEALMENT -- BUT THAT FACEBOOK CONCEALED AND DIDN'T LET BE
24 KNOWN PRIOR TO THAT DATE.

25 SO THAT WOULD SIMPLY BAR ANY CLAIM THAT STARTED LONG

1 ENOUGH AGO IF YOU COULD SUCCESSFULLY CONCEAL IT SO THAT YOUR
2 ACTS WITHIN THE LIMITATIONS PERIOD LOOK LIKE YOUR ACTS BEFORE
3 THE LIMITATIONS PERIOD EVEN THOUGH NOBODY KNEW THAT YOU WERE
4 DOING IT.

5 SO THAT CAN'T BE THE WAY THAT CONTINUING -- THAT CAN'T BE
6 THE WAY THAT STATUTE OF LIMITATIONS WORKS, WHETHER YOU CALL IT
7 CONTINUING VIOLATION OR FRAUDULENT CONCEALMENT. YOU CAN'T
8 SIMPLY SUCCEED BY KEEPING YOUR ACTS SECRET, EVEN INTO THE
9 LIMITATIONS PERIOD, AND THEN SAYING, WELL, I WAS ALSO DOING IT
10 BEFORE SO I SHOULD BE ABLE TO GET AWAY WITH IT.

11 THE COURT: ALL RIGHT.

12 LET ME GO TO THE ADVERTISER COUNSEL. IS THERE ANYTHING
13 YOU WANT TO ADD?

14 MR. BATHAE: YES, YOUR HONOR.

15 SO THE PLATFORM CONDUCT CONTINUES FROM 2016 THROUGH 2018
16 WITH RESPECT TO THE CANVAS AND THE GAMES APPS, AND IT'S THE
17 SAME MODUS OPERANDI, WHICH IS TARGETING AND DEMANDING
18 AGREEMENTS.

19 THE AGREEMENTS THEMSELVES FROM THE 2015 PERIOD WERE
20 SECURED AROUND THEN, AND THEY CONTINUED WELL PAST AND INTO THE
21 LIMITATIONS PERIOD, INCLUDING, FOR EXAMPLE, WITH TINDER.

22 OBVIOUSLY, YOUR HONOR, THERE'S THE BACK-END INTEGRATION,
23 WHICH WAS IN LATE 2019 AND EARLY 2020, AND THE JEDI BLUE
24 AGREEMENT THAT BEGAN IN SEPTEMBER 2018.

25 NOW, ALL OF THESE ARE DISTINCT, OVERT ACTS, BUT THEY'RE

1 ALL IN FURTHERANCE OF THE SAME OVERARCHING CONSPIRACY, WHICH IS
2 TO PROTECT THE DATA TARGETING BARRIER TO ENTRY.

3 THE COURT: I KNOW YOU SAID THAT JEDI BLUE WAS NOT
4 BEFORE EITHER OF THE OTHER JUDGES. WHAT ABOUT YOUR OTHER, YOU
5 KNOW, PLATFORM CONDUCT THAT YOU'VE ALLEGED BETWEEN 2016 AND
6 2018? WERE THOSE BEFORE EITHER JUDGE IN --

7 MR. BATHAEE: NO, YOUR HONOR. THERE'S A VERY -- I'M
8 SORRY.

9 THE COURT: GO AHEAD.

10 MR. BATHAEE: NO, YOUR HONOR. THAT CONDUCT WOULDN'T
11 HAVE HELPED OUR DEVELOPERS IN REVEAL BECAUSE THEY WERE DRIVEN
12 OUT OF THE MARKET BY APRIL 2015 FOR THE MOST PART. THERE ARE
13 SOME EXCEPTIONS. SO THAT CONDUCT REALLY DIDN'T IMPACT THEM.

14 BUT HERE, YOU KNOW, IT WOULD HAVE INFLATED PRICES BECAUSE
15 THE SAME CONDUCT WAS CONTINUING, THERE WAS STILL INFLATED
16 DEMAND ON THE ADVERTISING PLATFORM, THERE WAS SCUTTling OF THE
17 DEVELOPER PLATFORM. SO IT HELPS US HERE.

18 IT REALLY WASN'T GERMANE TO THE CASE BEFORE JUDGE FREEMAN.

19 THE OTHER POINT -- THE BACK-END INTEGRATION WAS -- AND THE
20 BACK-END INTEGRATION WAS LARGELY PLED AS PART OF THE SECTION 7
21 CLAIMS, WHICH JUDGE FREEMAN REJECTED ON LACHES GROUNDS AND SO
22 WE DIDN'T REPLEAD THEM IN THE AMENDED COMPLAINT AS PART OF THE
23 SECTION 2 VIOLATION, AND LARGELY BECAUSE IT WAS MUCH LATER AND
24 IT WAS REALLY BEING DONE FOR STATUTE OF LIMITATIONS PURPOSES.

25 BUT HERE WE'RE SAYING THAT THAT ACTUALLY DID HAVE

1 ANTICOMPETITIVE EFFECT ON THE RELEVANT MARKET AND THE PRICES.

2 SO THOSE ARE TWO THINGS THAT ARE NOT -- THAT ARE BEFORE
3 YOUR HONOR FOR THE FIRST TIME IN THIS CONTEXT.

4 AND, OF COURSE, JEDI BLUE.

5 THE COURT: ALL RIGHT. SO I'M NOT COMPLETELY CLEAR
6 ON WHAT'S DIFFERENT BETWEEN REVEAL CHAT AND HERE OTHER THAN
7 JEDI BLUE, AND YOU'RE SAYING THE BACK-END INTEGRATION WAS
8 THERE, BUT IT'S BEING PLED FOR A DIFFERENT PURPOSE OR ARGUED
9 DIFFERENTLY.

10 MR. BATHAE: AND THAT THE ADDITIONAL PLATFORM
11 CONDUCT, YOUR HONOR, FROM 2016 TO '18 THROUGH CANVAS AND THE
12 GATEWAY, THAT'S RIGHT.

13 AND OF COURSE THE AGREEMENTS THEMSELVES. THEY WOULDN'T
14 HAVE CONCERNED THE DEVELOPERS DRIVEN OUT IN 2015, BUT THE
15 AGREEMENT WITH TINDER THAT SPANNED ALL THE WAY TO 2018, FOR
16 EXAMPLE, WOULD HAVE ANTICOMPETITIVE EFFECTS IN THE RELEVANT
17 MARKET HERE AND THERE WAS NO POINT IN PLEADING THEM THERE, AND
18 THAT'S SORT OF NEW HERE IN THAT RESPECT.

19 THE COURT: OKAY. LET ME ASK MY LAST QUESTION FOR
20 PLAINTIFFS ON CONTINUING VIOLATIONS, AND THEN I'D LIKE TO GO TO
21 FACEBOOK AND GIVE THEM AN OPPORTUNITY TO RESPOND.

22 SO JUDGE BOASBERG REJECTED THE STATE'S ARGUMENT ABOUT
23 FACEBOOK'S ACQUISITION OF IGROUP IN 2016 TO RESPOND TO, YOU
24 KNOW, A LACHES DEFENSE BY FACEBOOK.

25 AND IN THIS CASE, THE CONSUMERS -- I GUESS THIS WOULD GO

1 TO MR. SWEDLOW -- ARE SIMILARLY ARGUING ABOUT THE ACQUISITIONS
2 OF TBH AND GIPHY AS CONTINUING VIOLATIONS.

3 SO HOW WOULD YOU RESPOND TO A REJECTION OF THOSE
4 ACQUISITIONS ALONG THE SAME LINES OF WHAT JUDGE BOASBERG
5 SAID --

6 MR. SWEDLOW: LET ME --

7 THE COURT: -- ABOUT IGROUP?

8 MR. SWEDLOW: I THINK THIS IS A GOOD OPPORTUNITY
9 TO -- I WOULD LIKE TO DISTINGUISH OUR CLAIM FROM THAT CLAIM,
10 NOT JUST ON THE BASIS THAT I ALREADY DID.

11 SO THERE ARE ACTS THAT TOOK PLACE UNAVOIDABLY -- OR
12 WITHOUT DISPUTE THAT WE ALLEGE TOOK PLACE WITHIN THE
13 LIMITATIONS PERIOD.

14 LACHES IS DIFFERENT THAN A LIMITATIONS PERIOD AND REQUIRES
15 A DEMONSTRATION OF SOME PREJUDICE AND TIMELY -- AND LACK OF
16 TIMELINESS.

17 BUT SO NOT JUST PARAGRAPH 238, BUT THROUGHOUT THE
18 COMPLAINT, WHAT WE'RE ALLEGING IN HUNDREDS OF PARAGRAPHS IS
19 THAT FACEBOOK REASSURED, IN A DECEPTIVE WAY, OUR ENTIRE CLASS
20 THAT ITS CONDUCT RELATING TO DECEPTIVE ACQUISITION AND USE AND
21 SALE OF THE DATA WAS NOT HAPPENING.

22 AND WHAT THE COURT FOUND IN THE DISTRICT OF D.C. IS THIS,
23 I'M JUST GOING TO READ YOU ONE AND A HALF SENTENCES. QUOTE ON
24 PAGE 66, "HAD THE STATES RESPONDED TO THE SUBSTANTIAL
25 TIMELINESS ARGUMENT THAT FACEBOOK PUT FORWARD IN ITS MOTION TO

1 DISMISS BY RAISING OR EVEN HINTING AT A FACTUAL DISPUTE AS TO
2 WHEN THEIR CLAIMS ACCRUED OR A REASONABLE JUSTIFICATION FOR
3 THEIR LONG DELAYS IN FILING, THE OUTCOME HERE MIGHT WELL BE
4 DIFFERENT. THEY DID NOT DO SO."

5 AND SO IN OTHER WORDS -- NOW, LACHES IS DIFFERENT BECAUSE
6 IT REQUIRES PREJUDICE AND IT'S NOT A TIME PERIOD. BUT WE
7 ALLEGED CONDUCT WITHIN THE TIME PERIOD AND THOSE ACQUISITIONS
8 YOU'RE TALKING ABOUT ARE WITHIN THE TIME PERIOD, SO THEY
9 WOULDN'T BE BARRED BY LACHES BECAUSE WE HAVE A DAMAGES CLAIM
10 HERE.

11 BUT WHAT THE COURT SAID ON PAGE 66 IS THAT THE STATES
12 DIDN'T RESPOND AT ALL, SO IT ISN'T THAT THEIR ARGUMENT ON THE,
13 QUOTE, REASONABLE JUSTIFICATION FOR THEIR LONG DELAYS WERE
14 REJECTED. THEY DIDN'T MAKE ANY.

15 SO IF THEIR ARGUMENT WAS, WE WAITED TEN YEARS AFTER AN
16 ACQUISITION TO CHALLENGE THE ACQUISITION FOR REASONS OF
17 DECEPTION AND FRAUDULENT CONCEALMENT, THEY MIGHT HAVE WON.

18 BUT WHAT THE COURT SAID IS THE STATES MADE ZERO ARGUMENTS.

19 OUR COMPLAINT ALLEGES WHY WE DIDN'T FILE UNTIL DURING THE
20 LIMITATIONS PERIOD BECAUSE WE COULD NOT HAVE KNOWN ABOUT THE
21 DECEPTIVE CONDUCT.

22 THE COURT: DO YOU WANT TO ADD ANYTHING ABOUT THE
23 GIPHY AND TBH ACQUISITIONS? OTHERWISE I'D LIKE TO GO TO THE
24 FACEBOOK DEFENDANT.

25 MR. SWEDLOW: I'M GOING TO LET YOU GO ON --

1 THE COURT: OH, I'M SORRY. I'M ASKING COUNSEL FOR
2 THE ADVERTISERS.

3 MR. SWEDLOW: ALL RIGHT. SORRY.

4 MR. BATHAEE: NO, YOUR HONOR, THEY'RE NOT PART OF OUR
5 CASE.

6 THE COURT: OKAY. ALL RIGHT.

7 THEN LET ME GO TO FACEBOOK.

8 WHY WOULDN'T THE, YOU KNOW, JEDI BLUE AGREEMENT WITH
9 GOOGLE IN 2018 OR THE GIPHY AND TBH ACQUISITIONS IN 2017 AND
10 2018 BE NEW AND INDEPENDENT ACTS UNDER THE CONTINUING VIOLATION
11 DOCTRINE?

12 MS. MEHTA: THANK YOU, YOUR HONOR, AND I'LL TAKE
13 THOSE SEPARATELY BECAUSE THE ADVERTISERS ONLY ARE RELYING ON
14 JEDI BLUE, AND THE CONSUMERS APPARENTLY ONLY -- AND I'M GLAD
15 FOR THAT CLARIFICATION -- ARE RELYING ON THE TBH AND GIPHY
16 ACQUISITIONS.

17 SO LET ME START WITH JEDI BLUE. I THINK THERE'S A
18 FUNDAMENTAL PROBLEM WITH WHAT THE PLAINTIFFS ARE ARGUING. WHAT
19 JUDGE FREEMAN FOUND IS, ON BASICALLY IDENTICAL ALLEGATIONS TO
20 THE ADVERTISERS, THAT THE CLAIMS ARE TIME BARRED.

21 AND THE ONLY QUESTION BEFORE YOUR HONOR IS WHETHER THERE'S
22 SUFFICIENT -- THERE'S SOMETHING SUFFICIENTLY DIFFERENT OR NEW
23 ABOUT THE JEDI BLUE AGREEMENT THAT YOU COULD REACH BACK AND
24 MAKE TIMELY OTHERWISE UNTIMELY CLAIMS.

25 AND THE PROBLEM HERE FOR THE PLAINTIFFS IS THAT THE

1 JEDI BLUE AGREEMENT IS FUNDAMENTALLY DIFFERENT FROM THE ALLEGED
2 VIOLATION THAT IS AT THE CORE OF THEIR SECTION 2 CLAIM. SO I'M
3 GOING TO SET ASIDE THE SECTION 1 CLAIM BECAUSE WE'RE NOT
4 CHALLENGING THAT ON TIMELINESS GROUNDS.

5 BUT WITH RESPECT TO THE SECTION 2 CLAIM WHERE THEIR THEORY
6 IS EXCLUSIONARY CONDUCT BASED ON THIS ALLEGEDLY ANTICOMPETITIVE
7 SCHEME, THAT 2018 AGREEMENT HAS NO NEXUS TO THE ACTUAL
8 ALLEGATIONS OF WHAT THE UNDERLYING VIOLATIONS ARE.

9 SO ESSENTIALLY WHAT'S HAPPENING IS EXACTLY WHAT THE COURT
10 IN KLEHR SAID PLAINTIFFS ARE NOT ALLOWED TO DO. THEY'RE TRYING
11 TO BOOTSTRAP ACTS THAT HAPPENED AFTER THE VIOLATION -- AFTER
12 THE STATUTE OF LIMITATIONS PERIOD, OR IN THE STATUTE OF
13 LIMITATIONS PERIOD I SHOULD SAY, TO TRY TO REACH BACK AND MAKE
14 TIMELY ACTS THAT DIDN'T.

15 AND I THINK WHAT YOU HEARD FROM THE PLAINTIFFS WAS, WELL,
16 YOU KNOW, IT'S ALL PART OF THE SAME SCHEME.

17 IT'S NOT PART OF THE SAME SCHEME. THAT'S NOT WHAT'S
18 ALLEGED AT ALL.

19 THE SCHEME THAT IS ALLEGED BY THE ADVERTISERS IS THE COPY
20 ACQUIRES KILL SCHEME. THAT IS THE CORE OF THEIR SCHEME AND
21 THEIR PLATFORM ALLEGATIONS.

22 THOSE HAVE NO RELATIONSHIP TO THE GOOGLE NETWORK BIDDING
23 AGREEMENT WHICH WAS ENTERED INTO IN 2018 AND IS THE BASIS FOR A
24 SECTION 1 CLAIM.

25 SO THEY'RE TAKING THE SECTION 2 CLAIM THAT IS CONNECTED TO

1 UNILATERAL CONDUCT AND THEY'RE TRYING TO BOOTSTRAP A SECTION 1
2 CLAIM TO TRY TO MAKE THAT TIMELY.

3 AND I THINK THE ALLEGATIONS WITH RESPECT TO THE GOOGLE
4 NETWORK BIDDING AGREEMENT AND WHAT THE FACTS OF THAT AGREEMENT
5 ARE, ARE REALLY CRITICAL HERE. THAT AGREEMENT IS ALLEGED TO
6 HAVE CONCERTED ACTION BETWEEN FACEBOOK AND GOOGLE WITH RESPECT
7 TO ADS THAT ARE SOLD ON THE GOOGLE AD EXCHANGE. THEY HAVE
8 NOTHING TO DO WITH THE ADS ON THE FACEBOOK PLATFORM, WHICH IS
9 WHERE THESE ADVERTISERS ARE CLAIMING THAT THEY WERE INJURED BY
10 THE ALLEGED ANTICOMPETITIVE SCHEME.

11 THERE'S JUST NO NEXUS BETWEEN WHAT IT IS THAT WAS THE
12 ACTUAL CORE OF THE ANTITRUST CLAIMS IN SECTION 2 AND THE ACT
13 THAT THEY'RE NOW POINTING TO DURING THE LIMITATIONS PERIOD.

14 AND I WOULD POINT YOUR HONOR HERE TO THE NINTH CIRCUIT'S
15 DECISION IN PACE WHICH PROVIDES THE FRAMEWORK TO ASSESS WHETHER
16 CONDUCT IS ACTUALLY PART OF THE CONTINUING VIOLATION, AND WHAT
17 THE COURT SAYS IS THAT WE LOOK TO SEE WHETHER OR NOT THE
18 ANTITRUST -- OR THE ANTICOMPETITIVE ACT IS A SINGLE OVERT ACT
19 OR IT'S A CONTINUING ANTITRUST VIOLATION.

20 AND IN THE SANDOVAL CASE -- AND I'LL GIVE YOU THE CITATION
21 TO THIS -- SANDOVAL VERSUS SATICOY, S-A-T-I-C-O-Y, LEMON
22 ASSOCIATION AT 747 F.SUPP 1373 AT 1385.

23 THE COURT IN C.D. CAL NOTED THAT YOU'RE GOING TO HAVE A
24 CONTINUING VIOLATION WHERE THERE IS A SUBSTANTIAL NEXUS BETWEEN
25 THE TIME BARRED ACTS AND THE TIME ASSERTED ACTS, AND THAT NEXUS

1 IS WHAT'S MISSING BETWEEN THE SECTION 1 CLAIM BASED ON
2 CONCERTED ACTION BETWEEN GOOGLE AND FACEBOOK THAT IS ALLEGED TO
3 IMPACT PEOPLE ON THE GOOGLE AD EXCHANGE, WHICH IS COMPLETELY
4 INDEPENDENT AND DOES NOT HAVE A SUBSTANTIAL NEXUS TO THE
5 SECTION 1 -- SECTION 2 UNILATERAL CONDUCT ACTS THAT ARE ALLEGED
6 AS THE CORE OF THE ANTITRUST VIOLATION BROUGHT IN THE SECTION 2
7 CLAIM BY THE ADVERTISERS.

8 THE COURT: LET ME GIVE THE ADVERTISER'S COUNSEL AN
9 OPPORTUNITY TO RESPOND.

10 MR. BATHAE: WELL, YOUR HONOR, THE CENTRAL PREMISE
11 OF THE SCHEME IS TO STRENGTHEN THAT DATA TARGETING BARRIER TO
12 ENTRY, AND WHAT GOOGLE DID WAS GAVE ITS A.I. OVER TO FACEBOOK
13 TO IDENTIFY 90 PERCENT OF FACEBOOK'S USERS TO TAKE THEM OUT OF
14 THOSE AD EXCHANGES AND ALMOST EXCLUSIVELY INTO THE HANDS OF
15 FACEBOOK. FACEBOOK GETS TWICE THE AMOUNT OF TIME TO BID ON
16 THEM AND, IN ESSENCE, KEEPS CONTROL OVER ITS OWN USERS, AND
17 THESE TWO MARKETS ARE ABOUT TO CONVERGE AND THEY PAID EACH
18 OTHER OFF TO STAY OUT OF EACH OTHER'S MARKETS.

19 THAT ALLOWED FACEBOOK TO KEEP PRICES INFLATED ON THE
20 SOCIAL ADVERTISING SIDE OF THE MARKET. SO IT IS RELATED. IT'S
21 RELATED IN THE SENSE THAT IT MAINTAINED THEIR MONOPOLY,
22 INFLATED PRICES, AND STRENGTHENED THE DATA TARGETING BARRIER TO
23 ENTRY. IT'S ALL PART OF THE OVERARCHING SCHEME TO STRENGTHEN
24 THAT DATA TARGETING BARRIER TO ENTRY, TO MAINTAIN THAT MARKET
25 AS A SILO SO THERE'S NO COMPETITIVE PRICE CHECK.

1 SO THEY'RE VERY -- THEY'RE CONNECTED.

2 IT'S A NEW ACT, IT FALLS UNDER SECTION 2 AND UNDER
3 SECTION 1. SO, YOUR HONOR, I THINK IT'S JUST A
4 MISCHARACTERIZATION TO SAY, WELL, THAT'S COMPLETELY ON THE
5 GOOGLE SIDE OF THE FENCE, BECAUSE IT'S ALLOWING FACEBOOK TO
6 MAKE SURE NO ONE ON THE GOOGLE SIDE OF THE FENCE CAN PAY AT AN
7 AUCTION TO ADVERTISE TO SOMEONE THEY WOULD OTHERWISE HAVE TO GO
8 THROUGH FACEBOOK TO ADVERTISE TO, AND IT STAVED OFF THE
9 POTENTIAL MERGING OF THESE MARKETS.

10 AND SO, YOU KNOW, IT VERY MUCH MAINTAINED THAT BARRIER TO
11 ENTRY.

12 AND THAT'S ALL I HAVE TO SAY ON THAT SUBJECT. I DO THINK
13 IT'S ADEQUATELY PLED. I DISAGREE WITH THE PREMISE. AND THE
14 ALLEGATIONS ARE IN THE COMPLAINT, OF COURSE.

15 THE COURT: LET ME GO BACK TO MS. MEHTA.

16 CAN YOU ADDRESS NOW THE GIPHY AND TBH ACQUISITION?

17 MS. MEHTA: YES, YOUR HONOR, CERTAINLY HAPPY TO DO
18 THAT.

19 SO THIS IS WITH RESPECT TO THE USER CLASS, AND ON THE
20 CONTINUING VIOLATION DOCTRINE, I THINK THE FUNDAMENTAL PROBLEM
21 WITH THE GIPHY AND THE TBH ACQUISITION IS THEY'RE NOT
22 CONTINUING VIOLATIONS BECAUSE THEY'RE NOT INDEPENDENTLY ALLEGED
23 TO BE VIOLATIVE ACTS.

24 THE TBH ACQUISITION IS NOT CHALLENGED AS BEING
25 ANTICOMPETITIVE. THE GIPHY ACQUISITION IS NOT CHALLENGED AS

1 BEING ANTICOMPETITIVE. AND WHAT THEY'RE ESSENTIALLY TRYING TO
2 DO IS SAY, WE HAVE THIS ANTITRUST VIOLATION THAT WE CLAIM
3 OCCURRED DURING THIS PERIOD OF TIME AND WE'RE GOING TO NOW SAY
4 THESE OTHER ACQUISITIONS -- WHICH WE DON'T THINK ARE ACTUALLY
5 ANTICOMPETITIVE, WE'RE NOT ALLEGING ARE ANTICOMPETITIVE --
6 SOMEHOW CAN BE ALL THROWN IN TOGETHER AND MAKE THE OVERALL
7 COURSE OF CONDUCT ANTICOMPETITIVE.

8 AND THE RESPONSE I WOULD HAVE TO THAT IS ZERO PLUS ZERO
9 PLUS ZERO IS STILL ZERO, WHICH IS THOSE THINGS ARE NOT
10 INDEPENDENTLY VIOLATIVE AND SO THEY'RE NOT A CONTINUING
11 VIOLATION. THAT'S ONE POINT.

12 THE SECOND POINT IS IF YOU LOOK AT THEIR -- WELL,
13 ACTUALLY, LET ME STOP THERE BECAUSE I WANT TO SEPARATELY
14 ADDRESS THE PRIVACY RELATED CONTINUING VIOLATION ALLEGATIONS,
15 BUT I'LL WAIT TO LET YOUR HONOR ASK QUESTIONS ABOUT THAT IF YOU
16 HAVE ANY.

17 THE COURT: DO YOU WANT TO RESPOND TO THAT BRIEFLY,
18 MR. SWEDLOW?

19 MR. SWEDLOW: YES. I'M NOT REALLY FOLLOWING, SO I'M
20 GOING TO DISAGREE WITH THE ARGUMENT THAT EACH THING THAT IS
21 PART OF THE COURSE OF CONDUCT OF THE ANTICOMPETITIVE BEHAVIOR
22 WHICH CAUSED THE ANTICOMPETITIVE HARM HAS TO BE A STANDALONE
23 CLAIM. THAT'S NOT THE WAY IT WORKS.

24 THESE ACQUISITIONS TOOK PLACE DURING THE LIMITATIONS
25 PERIOD AND ARE NOT TIME BARRED. THE ARGUMENT IS THAT WE DIDN'T

1 SEPARATELY ALLEGE A STANDALONE CLAIM.

2 BUT WE'RE NOT ALLEGING OUR CASE HAS INDIVIDUAL
3 ACQUISITIONS AS STANDALONE CLAIMS. THE FUNDAMENTAL PROBLEM
4 WITH THE WAY FACEBOOK IS READING OUR COMPLAINT AND WHAT IT
5 ACTUALLY SAYS IS THE ANTICOMPETITIVE CONDUCT IS THE USE OF
6 CONSUMER DATA IN AN ANTICOMPETITIVE WAY, IN A WAY THAT WAS
7 DISHONEST, NOT DISCLOSED, THE SUBJECT OF GOVERNMENT LAWSUITS
8 AND ALLEGATIONS, BUT ALSO USED TO DECIDE WHAT TO ACQUIRE AND
9 WHAT NOT TO ACQUIRE.

10 SO THE ILLEGAL AND ANTICOMPETITIVE USE OF CONSUMER DATA,
11 THROUGH ONAVO, WHICH WASN'T DISCLOSED OR KNOWN UNTIL APPLE
12 KICKED THEM OUT IN 2018/2019, THAT WASN'T KNOWN UNTIL DURING --
13 WITHIN THE LIMITATIONS PERIOD, AND THE ACQUISITIONS WE
14 IDENTIFIED ARE ALSO DURING THAT LIMITATIONS PERIOD.

15 THE ARGUMENT IS THAT YOU DIDN'T PLEAD THAT THAT SINGLE
16 ACQUISITION IS YOUR CLAIM.

17 BUT IT'S NOT OUR CLAIM. IT'S THAT THAT'S PART OF THE
18 COURSE OF CONDUCT OF THE ANTICOMPETITIVE USE AND DECEPTIVE USE
19 OF DATA. THAT'S ALL WE'RE SAYING. WE'RE NOT SAYING THAT THAT
20 PARTICULAR ACQUISITION, STANDING ALONE, IS OUR COMPLAINT
21 BECAUSE IT'S NOT.

22 THE COURT: ALL RIGHT.

23 MS. MEHTA, WHAT DID YOU WANT TO SAY ABOUT THE ONGOING
24 ALLEGED ACTS OF DECEPTIVE PRACTICES REGARDING CONSUMER DATA?

25 MS. MEHTA: YES, YOUR HONOR.

1 ACTUALLY, BEFORE I DO THAT, CAN I HAVE JUST A COUPLE OF
2 SECONDS TO RESPOND TO THAT LAST POINT MR. SWEDLOW MADE, BECAUSE
3 I WANT THERE TO BE CLARITY ABOUT WHAT THE ISSUE IS.

4 WE'RE NOT SAYING THEY NEEDED TO HAVE A STANDALONE CLAIM ON
5 THE TBH AND GIPHY ACQUISITIONS.

6 BUT WE ARE SAYING THEY NEEDED TO ALLEGE THAT THOSE WERE
7 ANTICOMPETITIVE, AND THERE IS NO ALLEGATION THAT THOSE ARE
8 ANTICOMPETITIVE.

9 NOR WOULD THE FACT THAT SOMEONE IS ALLEGEDLY USING ONAVO
10 DATA TO DECIDE WHO TO ACQUIRE AND WHO NOT TO ACQUIRE MAKE THEM
11 ANTICOMPETITIVE.

12 AND THIS IS WHERE JUDGE BOASBERG HAD IT EXACTLY RIGHT.
13 THE SUBSEQUENT STANDALONE ACQUISITIONS THAT TOOK PLACE MUCH
14 LATER IN TIME AND ARE NOT INDIVIDUALLY ANTICOMPETITIVE DO NOT
15 CONSTITUTE A CONTINUING VIOLATION.

16 SO I JUST WANT TO MAKE VERY CLEAR WHAT OUR ARGUMENT THERE
17 IS.

18 WITH RESPECT TO CONTINUING VIOLATION ON THE PRIVACY BASED
19 THEORY, THE ALLEGATIONS THAT THEY'RE MAKING ABOUT PRIVACY ARE
20 NO DIFFERENT IN TERMS OF THE POST-STATUTE OF LIMITATIONS PERIOD
21 THAN THE ALLEGATIONS THAT THEY WERE MAKING BEFORE. THERE IS NO
22 ALLEGATION OF ANY NEW OR INDEPENDENT ACT. IT'S QUINTESSENTIAL
23 REAFFIRMANCE OF THE PRIOR STRATEGY UNDER THE BAY AREA SURGICAL
24 MANAGEMENT CASE.

25 AND INDEPENDENT OF WHETHER WE'RE TALKING ABOUT THE PRIVACY

1 ALLEGATIONS OR WE'RE TALKING ABOUT THE ACQUISITIONS, FOR ALL OF
2 THE CONTINUING VIOLATION ALLEGATIONS MADE BY THE USERS, THERE
3 IS NO ALLEGATION OF ANY NEW AND ACCUMULATING INJURY, AND WE
4 HAVEN'T HEARD IN THE BRIEFING OR HEARD TODAY ANY ALLEGATION
5 THAT WOULD SUPPORT NEW AND CONTINUING INJURY, WHICH IS AN
6 INDEPENDENT BASIS TO REJECT BOTH OF THE USERS' CONTINUING
7 VIOLATIONS THEORIES.

8 AND THEN I'LL SAVE ANYTHING I HAVE ON THE ADVERTISERS
9 UNTIL YOUR HONOR WANTS TO HEAR ABOUT THAT.

10 THE COURT: I DON'T WANT TO HEAR ANYTHING MORE ON
11 THIS. I HAVE A LOT OF QUESTIONS AND I'D LIKE TO MOVE ON TO A
12 NEW TOPIC. SO THANK YOU TO ALL OF YOU.

13 LET'S GO TO FRAUDULENT CONCEALMENT. SO I'LL START WITH
14 MR. SWEDLOW FOR THE CONSUMERS.

15 A LOT OF THE CONDUCT THAT YOU RELY ON IN YOUR COMPLAINT IS
16 PUBLIC, IS WIDELY REPORTED. SO WHY DIDN'T THE CONSUMERS HAVE
17 CONSTRUCTIVE KNOWLEDGE OF THESE CLAIMS? AND OBVIOUSLY WE CAN
18 GET INTO THE ISSUE THAT MR. BATHAEE RAISED ABOUT WHETHER IT'S
19 EVEN APPROPRIATE TO MAKE A CONSTRUCTIVE KNOWLEDGE DECISION ON A
20 MOTION TO DISMISS.

21 BUT, YOU KNOW, FOR EXAMPLE, THE FTC INVESTIGATIONS, THE
22 PUBLIC SCRUTINY OF FACEBOOK, WHY DIDN'T THAT TRIGGER
23 CONSTRUCTIVE KNOWLEDGE IN YOUR CLIENTS?

24 MR. SWEDLOW: WELL, I THINK THAT IS THE KEY QUESTION,
25 AND I'LL ACCEPT IT AS CONSTRUCTIVE KNOWLEDGE OR NOT BECAUSE THE

1 REVELATION ABOUT THE EXTENT OF FACEBOOK'S DECEPTION CAME ABOUT,
2 AT THE EARLIEST, IN EARLY 2018 BASED ON THE
3 CAMBRIDGE ANALYTICA, I'LL CALL IT A SCANDAL, BUT BASED ON WHAT
4 HAPPENED WITH CAMBRIDGE ANALYTICA.

5 AND JUST TO BE CLEAR ON HOW SCARY AND DECEPTIVE THAT WAS,
6 IF YOU WERE FRIENDS WITH SOMEBODY WHO HAD SIGNED UP TO USE THAT
7 APP, ONE OF THOUSANDS OF PEOPLE WHO WERE USING THAT APP -- AND
8 THAT COULD HAVE BEEN WHATEVER APP, THAT COULD HAVE BEEN SOME
9 RIGHT WING POLITICAL APP -- YOUR DATA, 87 MILLION PEOPLE'S DATA
10 WHO WERE FRIENDS WITH THE THOUSANDS OF PEOPLE WHO USED THAT
11 APP, THEIR DATA WAS SHARED AND USED BY THAT APP DEVELOPER.

12 THAT'S THE AFFECTED FRIEND THING THAT FACEBOOK SAID AND
13 AGREED IN A CONSENT DECREE IN 2011 AND 2012 TO STOP DOING, BUT
14 THEY DIDN'T STOP DOING.

15 SO WHILE I THINK -- YOU COULD ARGUE, AND WE COULD EVEN
16 ACCEPT THE ARGUMENT, THAT AS OF 2018 AND 2019, AND THEN THE
17 CONGRESSIONAL INVESTIGATION WHICH BECAME PUBLIC, THAT THE CLASS
18 WAS PUT ON CONSTRUCTIVE NOTICE OF ALL OF FACEBOOK'S INCREDIBLY
19 DECEPTIVE CONDUCT WITHIN THE LIMITATIONS PERIOD, AND BECAUSE
20 THERE IS NO PREJUDICE -- THERE'S NO PREJUDICE INQUIRY IN A
21 STATUTE OF LIMITATIONS CONTEXT -- ALL OF THE REVELATIONS TOOK
22 PLACE IN THE LIMITATIONS PERIOD, EXCEPT FOR PRIOR REVELATIONS
23 THAT FACEBOOK AFFIRMATIVELY LIED ABOUT.

24 IN 2011/2012, FACEBOOK ENTERED INTO A CONSENT DECREE. IN
25 2019, FACEBOOK WAS SUED BY D.O.J. FOR LYING AND DECEIVING ITS

1 OWN CONSENT DECREE PROMISE TO THE FTC, AND WHAT THE FTC SAID --
2 THIS IS IN PARAGRAPH 241 OF OUR COMPLAINT -- IS THAT FACEBOOK
3 ENCOURAGES USERS TO SHARE INFORMATION ON ITS PLATFORM BY
4 PROMISING USERS THEY CAN CONTROL THE PRIVACY INFORMATION,
5 PRIVACY OF THEIR INFORMATION. BUT FACEBOOK REPEATEDLY USED
6 DECEPTIVE DISCLOSURES AND SETTINGS TO UNDERMINE USERS' PRIVACY
7 PREFERENCE.

8 THE COURT: CAN YOU --

9 MR. SWEDLOW: THE GOVERNMENT FIGURED THAT OUT IN
10 2019, AND SO TO SAY THAT THE CLASS SHOULD HAVE FIGURED IT OUT
11 BEFORE THE GOVERNMENT SUED FACEBOOK AND SETTLED FOR \$5 BILLION
12 DOESN'T MAKE ANY SENSE.

13 FACEBOOK DECEIVED ALL OF THE USERS AND THE GOVERNMENT
14 BASED ON ITS PRIOR CONSENT DECREE.

15 THE COURT: OKAY. SO LET ME BACK UP A MINUTE. CAN
16 YOU GIVE ME -- GIVE ME THEN THE FRAUDULENT CONCEALMENT
17 TIMELINE. SO YOU'RE SAYING CAMBRIDGE ANALYTICA, THAT'S, WHAT,
18 MARCH 2018?

19 MR. SWEDLOW: YES, I WOULD SAY THAT FACEBOOK'S
20 FRAUDULENT CONCEALMENT WAS LESS EFFECTIVE AFTER
21 CAMBRIDGE ANALYTICA, AFTER THE D.O.J. LAWSUIT, AFTER THE
22 CONGRESSIONAL INQUIRY. THERE WERE STILL PUBLIC STATEMENTS,
23 THEY'RE JUST NOT AS EFFECTIVE.

24 THE COURT: OKAY. GIVE ME --

25 MR. SWEDLOW: SO YOU'RE SAYING WHY DID WE WAIT FROM

1 2018 TO 2020 WHEN WE ACTUALLY FILED, THAT JUST ISN'T RELEVANT
2 FOR STATUTE OF LIMITATIONS WE WOULD ARGUE BECAUSE IT'S A FINITE
3 TIME PERIOD FOR STATUTE OF LIMITATIONS AND WE WAITED UNTIL WE
4 HAD THE BEST CASE, MEANING UNTIL CONGRESS FINISHED THEIR
5 INQUIRY AND THE DOCUMENTS THAT THE GOVERNMENT GOT FROM FACEBOOK
6 WERE MADE PUBLIC SO WE COULD PLEAD A REALLY DETAILED COMPLAINT.
7 BUT THAT'S THE ONLY PERIOD WHERE WE WAITED.

8 I CAN'T BELIEVE THERE'S A REAL DISPUTE THAT PRIOR TO
9 CAMBRIDGE ANALYTICA, FACEBOOK -- FACEBOOK WAS ENGAGED IN ACTIVE
10 CONCEALMENT OF ITS DECEPTIVE USE OF DATA.

11 THE COURT: SO WHAT -- I'M SORRY. CAN YOU BACK UP
12 AND GIVE ME THE TIMELINE OF WHAT PLAINTIFFS KNEW? THAT WOULD
13 REALLY BE HELPFUL FOR THIS FRAUDULENT CONCEALMENT ANALYSIS.

14 MR. SWEDLOW: YES.

15 THE COURT: SO I HAVE ONAVO, AUGUST 2018. I HAVE
16 CAMBRIDGE ANALYTICA, MARCH 2018. WHAT DID PLAINTIFFS KNOW WHEN
17 SO THAT I CAN HAVE A TIMELINE IN RULING ON THIS MOTION?

18 MR. SWEDLOW: OKAY. SO I'M GOING TO DIRECT YOU IN
19 PART TO OUR MULTI -- OUR VERY LONG PARAGRAPH 238 ONLY BECAUSE
20 IT IS KIND OF A LAYOUT OF A TIMELINE OF THIS FRAUDULENT
21 CONCEALMENT.

22 I DON'T KNOW IF YOU -- I DON'T WANT TO READ ALL OF THE
23 PRIOR --

24 THE COURT: THAT'S OKAY. IF YOU GIVE ME ONE
25 MINUTE -- I MEAN, I HAVE ALL THE CASES AND ALL THE COMPLAINTS

1 AND ALL THE BRIEFING IN FRONT OF ME, SO LET ME JUST --

2 MR. SWEDLOW: OKAY.

3 THE COURT: IF YOU WOULD GIVE ME A SECOND, I CAN GO
4 TO THAT PARAGRAPH.

5 OKAY. SO YOU'RE SAYING THIS IS WHERE I SHOULD LOOK?

6 MR. SWEDLOW: THIS IS WHERE THE, THE -- YEAH, THE
7 FRAUDULENT CONCEALMENT IS LAID OUT AS A TIMELINE, THESE ARE --
8 I WOULD SAY THESE ARE OUR BEST 15 POINTS ON THE TIMELINE.

9 THE ONLY POINT THAT I WANT TO REITERATE, THAT I HOPE I'M
10 MAKING CORRECTLY, IS ONCE WE GET TO DECEMBER 2016, IT DOESN'T
11 LEGALLY MATTER ANYMORE.

12 IN OTHER WORDS, IF WE WERE SLOW BECAUSE THINGS WERE
13 REVEALED IN MARCH OF 2018, IN APRIL OF 2018 AND THEN 2019,
14 WE'RE ALLOWED TO WAIT -- ONCE -- ONCE WE GET INTO THE STATUTE
15 OF LIMITATIONS PERIOD, IF OUR CLAIM IS REVEALED TO US, WE HAVE
16 FOUR YEARS FROM THE POINT THE CLAIM, WE WOULD -- A REASONABLE
17 PERSON WOULD KNOW TO HAVE A CLAIM.

18 SO I'M NOT ATTEMPTING TO JUSTIFY THE DELAY LEGALLY FROM
19 2018 TO 2020, JUST TO BE CLEAR. SO THAT'S WHERE I'M REALLY
20 MORE TAKING THAT ON AS A LEGAL MATTER, THAT ONCE WE GET WITHIN
21 THE LIMITATIONS PERIOD, WE'RE ALLOWED TO WAIT UP UNTIL FOUR
22 YEARS. ANYONE IS. IF I SLIP AND FALL, I KNOW I HAVE A CLAIM,
23 I HAVE A BROKEN ANKLE, BUT I CAN STILL WAIT WHATEVER THE
24 STATUTE OF LIMITATIONS IS TO BRING MY CLAIM.

25 AND IT'S THE REVELATION OF CAMBRIDGE ANALYTICA, THE ONAVO,

1 THE D.O.J. COMPLAINT, THE CONGRESSIONAL INVESTIGATIONS, THE
2 MILLIONS OF DOCUMENTS WE NOW HAVE, THAT'S THE REVELATION THAT
3 WAS WITHIN THE LIMITATIONS PERIOD.

4 THE FRAUDULENT CONCEALMENT TOOK PLACE UP UNTIL 2018, BUT
5 THEN WAS NOT VERY EFFECTIVE AFTER THAT.

6 THE COURT: HOW DO YOU RESPOND TO, YOU KNOW,
7 FACEBOOK'S ARGUMENT THAT WHAT YOU HAVE IN PARAGRAPH 238 IS JUST
8 TOO GENERAL TO BE AN AFFIRMATIVE ACT?

9 MR. SWEDLOW: WELL, SO THESE ARE ACTUALLY VERY
10 SPECIFIC. I THINK THESE ARE EVEN MORE SPECIFIC THAN WHAT YOU
11 FOUND TO BE SUFFICIENT IN I THINK IT'S BROWN V. GOOGLE. THESE
12 ARE SPECIFIC STATEMENTS.

13 BUT THIS IS -- THE REASON WHY IT'S NOT GENERAL IS BECAUSE
14 THIS IS -- I'M USING THIS IN QUOTES -- THIS IS THE SECRET SAUCE
15 THAT MADE FACEBOOK DOMINANT AND MAINTAINED ITS DOMINANCE. IF
16 WE GO ALL THE WAY BACK TO PARAGRAPH 109, THERE'S A MEMO
17 ACTUALLY ENTITLED SECRET SAUCE, AN INTERNAL MEMO FROM 2008.

18 THE FACT THAT PEOPLE FEEL SAFE THAT THEIR INFORMATION
19 WON'T GET SHARED OUTSIDE OF THEIR SOCIAL NETWORK AND CAN BE
20 KEPT PRIVATE IS THE REASON THAT FACEBOOK IS A \$974 BILLION
21 COMPANY, AND THEIR -- THIS PARAGRAPH HAS TWO, I THINK, RELEVANT
22 DOCUMENTS IN QUOTES.

23 ONE IS THE INTERNAL REPORT CALLED "FACEBOOK SECRET SAUCE"
24 THAT EXPLAINS THAT USERS WILL SHARE MORE INFORMATION IF GIVEN
25 MORE CONTROL OVER WHO THEY ARE SHARING IT WITH AND HOW THEY

1 SHARE. THAT'S WHAT FACEBOOK WAS DECEIVING USERS ON. AND
2 THIS -- NOW IT'S TEN YEARS OLD. THIS STATEMENT -- THIS POST
3 FROM MARK ZUCKERBERG, WHAT HE SAYS HERE IN 109, I'M QUOTING IT
4 NOW, "WHEN I BUILT THE FIRST VERSION OF FACEBOOK, ALMOST NOBODY
5 I KNEW WANTED A PUBLIC PAGE ON THE INTERNET. THAT SEEMED
6 SCARY. BUT AS LONG AS THEY COULD MAKE THEIR PAGE PRIVATE, THEY
7 FELT SAFE SHARING WITH THEIR FRIENDS ONLINE. CONTROL IS KEY.
8 WITH FACEBOOK, FOR THE FIRST TIME, PEOPLE HAD THE TOOLS THEY
9 NEEDED TO DO THIS. THAT'S HOW FACEBOOK BECAME THE WORLD'S
10 BIGGEST COMMUNITY ONLINE."

11 AND THAT'S OUR FUNDAMENTAL ALLEGATION IS THAT FACEBOOK WAS
12 ACTIVELY DECEIVING AND LYING TO USERS ABOUT WHAT IT WAS DOING
13 WITH THE DATA AND THERE WAS NO WAY FOR USERS TO KNOW THAT.

14 SO WHEN A USER SHARES PHOTOS OF ITS CHILD FOR 15 YEARS ON
15 FACEBOOK THINKING IT'S ONLY GOING TO GET SHARED WITH ITS
16 FRIENDS, BUT IT'S ACTUALLY GETTING SHARED WITH OTHER APPS AND
17 PEOPLE WHO WANT ACCESS TO THE DATA AND INFORMATION, THAT'S OUR
18 ALLEGATION. THAT WAS DECEPTIVE, AND STEALING THAT FEED STOCK
19 OR VITAL INFORMATION TO MAINTAIN ITS DOMINANCE IN THESE
20 MARKETS, THAT'S THE DECEPTION AND THAT'S WHAT FACEBOOK
21 GENERALLY AND SPECIFICALLY WAS LYING TO USERS ABOUT, BOTH WITH
22 TERMS OF USE AND SERVICE AND PUBLIC STATEMENTS THAT WOULD
23 ENSURE IT HAD THE SECRET SAUCE.

24 THE REASON -- AND THIS WAS OBSERVED IN THE DISTRICT OF
25 D.C. CASE -- IT'S A LOGICAL, UNDERSTANDABLE DISTINCTION.

1 PEOPLE WON'T POST PUBLICLY A VIDEO OF THEIR INFANT CHILD ON
2 YOUTUBE BECAUSE IT'S PUBLIC. BUT THEY WILL POST THAT IN THEIR
3 SOCIAL NETWORK ON FACEBOOK. THAT'S THE DISTINCTION.

4 SO TO LIE ABOUT PRIVACY AND DATA PROTECTION ISN'T GENERAL.
5 IT'S THE MOST SPECIFIC, MOST IMPORTANT THING THAT MADE
6 FACEBOOK, FACEBOOK.

7 THE COURT: LET ME ASK COUNSEL FOR THE ADVERTISERS,
8 IS THERE ANY TIMELINE YOU CAN PROVIDE, OR IF YOU WANT TO ADD
9 ANYTHING TO WHAT'S ALREADY BEEN SAID ABOUT WHAT PLAINTIFFS,
10 WHAT PLAINTIFFS KNEW?

11 MR. BATHAEE: YES, YOUR HONOR.

12 SO IN APRIL -- ON APRIL 30TH, 2015 WAS THE FIRST BIG
13 PLATFORM MOVE AND THAT'S WHEN 40,000 DEVELOPERS WERE EXPELLED
14 OFF THE PLATFORM.

15 UP UNTIL THAT PERIOD, FACEBOOK KNOWS FOR ABOUT THREE YEARS
16 THAT THIS IS GOING TO HAPPEN AND TELLS PEOPLE TO KEEP
17 DEVELOPING, SO IT'S UNDER A DUTY TO SPEAK UP UNTIL THAT POINT.

18 AND AFTERWARDS, FACEBOOK THEN STARTS TO CONSISTENTLY
19 PEDDLE PRETEXT, AND WE ALLEGE THE PRETEXTUAL STATEMENTS IN 502,
20 503, THAT'S ON THE DAILY ANNOUNCEMENT IN 2015, APRIL 30TH, THE
21 WHO, WHAT, WHERE, AND WHEN; 505, STATEMENTS TO DEVELOPERS RIGHT
22 BEFORE THE ANNOUNCEMENT INCLUDING AIRBIQUITY AND MICROSOFT;
23 508, A BLOG POST APRIL 30TH, 2015 THAT SAYS IT WAS ABOUT GIVING
24 PEOPLE CONTROL OVER THEIR DATA; 509, AN FAQ WHICH THEN GOT
25 POSTED ON STACK OVERFLOW BY SIMON CROSS, AND THAT'S ALL ALLEGED

1 IN PARTICULAR IN THE COMPLAINT; AND THEN ON MARCH 26TH, 2018,
2 THERE'S ANOTHER BLOG POST THAT THEN, RIGHT AROUND THE BIG
3 CHANGES, YOU KNOW, IN AND AROUND THE CANVAS CONDUCT, THEY POINT
4 BACK TO THE ORIGINAL CHANGE IN 2015 AND SAY, OH, THAT WAS TO
5 PREVENT MISUSE OF USER DATA; 514 TO 515, WE SAY -- THERE'S A
6 NOVEMBER 24TH, 2018 BLOG POST THAT SAYS, OH, THOSE AGREEMENTS
7 THAT YOU HEAR ABOUT, THEY WERE MADE ON A SHORT-TERM BASIS AND
8 ONLY TO PREVENT APPS FROM BREAKING IN THE NEAR TERM. AND OF
9 COURSE THAT WAS FALSE, WE ALLEGE.

10 AND HOW DO WE KNOW THAT THE PRETEXT WAS FALSE, YOUR HONOR?
11 WE HAVE THEIR INTERNAL DOCUMENTS WHICH WERE MADE PUBLIC ON
12 NOVEMBER 6TH, 2019 BY NBC WHERE THEIR SENIOR-MOST API ENGINEER
13 SAYS THE VERY PRETEXT THAT THEY STATED IN THESE STATEMENTS WERE
14 FALSE AND PABLUM, AND THAT'S AT PARAGRAPHS 178 AND 179.

15 SO THERE IS A FACT QUESTION AS TO WHETHER THOSE -- THAT
16 WAS, IN FACT, PRETEXTUAL, AND I THINK WE'VE ALLEGED ENOUGH TO
17 SHOW THAT THOSE STATEMENTS WERE FALSE.

18 AND THAT'S THE TIMELINE. SO FROM 2015 TO 2000 -- FROM
19 2015 UNTIL NOVEMBER OF 2018, YOU HAVE A SERIES OF FALSE
20 STATEMENTS, AND THEN EVENTUALLY THE ENTIRE TRUTH COMES OUT ON
21 NOVEMBER 6TH, 2019.

22 AND THIS IS ONLY WITH RESPECT TO CONDUCT THAT FALLS, YOU
23 KNOW, PAST THE 2016 DECEMBER PERIOD, BEFORE THAT PERIOD.

24 THERE IS -- THERE ARE SOME ALLEGATIONS WITH RESPECT TO THE
25 MERGERS, YOUR HONOR, THAT THEY WERE FALSE STATEMENTS ABOUT

1 WHETHER THEY WOULD INTEGRATE WHATSAPP AND INSTAGRAM MADE TO
2 REGULATORS IN 2014. THAT'S AT PARAGRAPH 518 OF OUR COMPLAINT.

3 THAT WASN'T REVEALED UNTIL AUGUST 2016, SO THAT'S PROBABLY
4 WHEN THAT -- SORRY -- UNTIL MAY 2017. THAT'S WHEN THAT CLOCK
5 STARTS.

6 THE COURT: SO BOTH OF THESE COMPLAINTS ARE VERY LONG
7 WITH OVER 500 PARAGRAPHS. YOUR COMPLAINT HAS OVER 500
8 PARAGRAPHS. SO YOU'RE SAYING LOOK AT 503, 505, 508, 509, 178,
9 179, AND 518?

10 MR. BATHAEE: 518, 513, 514, 515. THERE'S A WHOLE
11 SECTION ON IT, YOUR HONOR. IT'S GOT A MAJOR HEADING ON
12 FRAUDULENT CONCEALMENT.

13 AND, YOUR HONOR, I DO WANT TO ADD 491 THROUGH -94 ABOUT
14 THE DUTY TO SPEAK AT THE TIME, AND OF COURSE THE HIGHLY -- THE
15 STATEMENT MADE FROM A SENIOR EXECUTIVE AT FACEBOOK IN 2010 THAT
16 IF ILYA SUKHAR TOLD THE TRUTH, THERE WOULD BE, QUOTE, A HIGH
17 LIKELIHOOD OF BREAKING INTO JAIL.

18 SO WE DO ALSO ALLEGE A CODE OF SILENCE IN THE FACE OF A
19 DUTY TO SPEAK.

20 SO ALL OF THAT TOGETHER ARE THE ACTIVE CONDUCT WE ALLEGE
21 FRAUDULENTLY CONCEALED THE ANTICOMPETITIVE CONDUCT. YOU
22 COULDN'T BRING THIS VERY ANTITRUST SUIT WITHOUT THAT
23 INFORMATION, AND IT WAS DESIGNED TO KEEP THAT INFORMATION OUT
24 OF PEOPLE'S HANDS.

25 THE COURT: AREN'T YOU SEEKING A PREVENTATIVE

1 INJUNCTION REGARDING THE PLATFORM-RELATED CONDUCT, SIMILAR TO
2 WHAT THE STATE SOUGHT?

3 MR. BATHAEE: NO, YOUR HONOR.

4 WE'RE SEEKING ONLY DAMAGES. AND TO THE EXTENT WE ASK FOR
5 EQUITABLE RELIEF IN THE -- EQUITABLE RELIEF IN THE COMPLAINT,
6 WE JUST WANT AN INJUNCTION. SO WE'RE NOT ASKING TO RESTORE OR
7 ANYTHING INJUNCTIVE OR CHANGE ANYTHING WITH RESPECT TO THE
8 PLATFORM.

9 THE COURT: OKAY. SO YOU'RE NOW DISCLAIMING THAT?
10 BECAUSE --

11 MR. BATHAEE: WELL, WE DID SO IN OUR SUPPLEMENTAL
12 BRIEF, YOUR HONOR, ON THE INJUNCTION. SO WE DON'T RAISE THE
13 LACHES ISSUES.

14 I DO WANT TO NOTE, OF COURSE, THAT IF THERE IS FRAUDULENT
15 CONCEALMENT, THERE IS NO LACHES BECAUSE THERE WOULD BE UNCLEAR
16 HANDS.

17 BUT JUDGE FREEMAN NEVER REACHED THAT ISSUE, EITHER.

18 THE COURT: OKAY. SO YOU'RE WITHDRAWING YOUR REQUEST
19 FOR PERMANENT INJUNCTIVE RELIEF.

20 WHAT ABOUT THE CONSUMER PLAINTIFFS? ARE YOU STILL SEEKING
21 YOUR INJUNCTIVE RELIEF, OR NOT?

22 MR. SWEDLOW: CAN I ANSWER IT THIS WAY? THE
23 INJUNCTIVE RELIEF -- THE REQUEST FOR RELIEF, WE MAKE TWO
24 ARGUMENTS.

25 ONE IS THAT IT'S NOT APPROPRIATE FOR THIS MOTION TO

1 DISMISS BECAUSE IT'S NOT A CLAIM, BUT I'M GOING TO JUST FALL ON
2 YOUR MERCY AND YOU'LL DECIDE THAT ONE, WHETHER I'M RIGHT OR
3 WRONG ON THAT.

4 BUT MORE IMPORTANTLY -- I DON'T WANT TO READ THE WHOLE
5 QUOTE AGAIN, BUT IF THE INJUNCTIVE RELIEF IS SUBJECT TO A
6 LACHES DEFENSE --

7 THE COURT: UM-HUM.

8 MR. SWEDLOW: -- THE STATE MADE LITERALLY NO ARGUMENT
9 AND DIDN'T PROVIDE, QUOTE, "ANY JUSTIFICATION FOR THEIR LONG
10 DELAY IN FILING." WE BELIEVE THAT PARAGRAPHS -- THAT
11 PARAGRAPH 238, ALONG WITH A COUPLE OTHER PARAGRAPHS I'D LIKE TO
12 IDENTIFY FOR YOU, I WOULD SAY 152 AND 146, IDENTIFY THE
13 JUSTIFIABLE DELAY IN BRINGING A CLAIM BASED ON DECEPTION.

14 AND SO I WOULD -- I WOULD ASK THE COURT TO CONSIDER THAT
15 IF YOU'RE GOING TO APPLY LACHES TO THE REQUEST FOR INJUNCTIVE
16 RELIEF, THAT YOU LOOK AT ALL OF THE ALLEGATIONS WE MADE ABOUT
17 JUSTIFIABLE DELAY.

18 AND THIS JUSTIFIABLE DELAY IS THAT THE GOVERNMENT, THE
19 U.K. GOVERNMENT, THE UNITED STATES GOVERNMENT, COULD NOT HAVE
20 KNOWN THE DECEPTION THAT FACEBOOK WAS ENGAGING IN UNTIL 2018,
21 2019, AND 2020. SO THE CONSUMER CLASS COULD ALSO NOT HAVE
22 KNOWN.

23 BUT I RECOGNIZE THAT THE INJUNCTIVE RELIEF IS DIFFERENT
24 THAN THE STATUTE OF LIMITATIONS, WHICH GIVES US AN ABSOLUTE
25 RIGHT FOR FOUR YEARS FROM DISCOVERY OF OUR CLAIM, AND THAT

1 WOULD HAVE BEEN -- THAT'S FROM DECEMBER 2016.

2 LACHES REQUIRES AN ANALYSIS OF BOTH PREJUDICE AND
3 JUSTIFIABLE DELAY. SO IT'S A DIFFERENT INQUIRY, BUT WE'VE
4 INCLUDED IN OUR COMPLAINT THINGS THAT THE STATE JUST DIDN'T, AT
5 LEAST IN THE FIRST ATTEMPT, DIDN'T INCLUDE.

6 THE COURT: LET ME ASK FACEBOOK, IF THE STATUTE OF
7 LIMITATIONS IS TOLLED, DOES THAT ADDRESS FACEBOOK'S LACHES
8 ARGUMENT? OR IS THERE STILL A LACHES ARGUMENT IF THERE'S
9 TOLLING?

10 MS. MEHTA: NO, YOUR HONOR, I DON'T THINK IT DOES
11 ADDRESS THE TOLLING ARGUMENT BECAUSE THE TYPES OF RELIEF ARE
12 INDEPENDENT.

13 AND INsofar AS THEY ARE SEEKING INJUNCTIVE RELIEF, THE
14 ANALYSIS THAT JUDGE BOASBERG AND JUDGE FREEMAN WENT THROUGH IS
15 THAT IT IS LONG PAST TIME FOR THEM TO CHALLENGE THE CONDUCT
16 THAT THEY HAVE ALLEGED THAT IS YEARS AND YEARS AND YEARS OLD,
17 AND THERE IS SIGNIFICANT PREJUDICE TO FACEBOOK FROM HAVING AN
18 INJUNCTION TRYING TO UNWIND CONDUCT THAT IS THAT OLD.

19 THE COURT: BUT YOU WOULD -- YOU WOULD AGREE THAT
20 CAMBRIDGE ANALYTICA WAS CERTAINLY A REVELATION ABOUT A LOT OF
21 FACEBOOK'S PRACTICES, AND THAT'S MARCH 2018.

22 MS. MEHTA: THAT'S TRUE, YOUR HONOR. BUT I DON'T
23 THINK -- AND I HAVEN'T HAD A CHANCE YET TO ADDRESS THE
24 FRAUDULENT CONCEALMENT COMMENTS FROM THE OTHER SIDE, AND WITH
25 YOUR HONOR'S PERMISSION, I'D LIKE TO DO THAT BECAUSE IT DOES

1 NOT HELP THEM IN THIS CASE.

2 THIS IS NOT A PRIVACY CASE. THIS IS AN ANTITRUST CASE.
3 AND THEY HAVE DONE A LOT OF HAND WAVING AROUND THE DECEPTION
4 THEORY AND THE PRIVACY ALLEGATIONS AND WHY THEY THINK THEY
5 SOMEHOW CAN RECAST PRIVACY ALLEGATIONS IN AN ANTITRUST CASE,
6 WHICH I'LL HAPPILY TALK ABOUT LATER.

7 BUT FOR PURPOSES OF FRAUDULENT CONCEALMENT, THE LAW IS
8 CLEAR: YOU ARE ON ACTUAL NOTICE -- YOU DON'T HAVE TO FIND
9 CONSTRUCTIVE NOTICE, YOU ARE ON ACTUAL CONSTRUCTIVE -- ACTUAL
10 NOTICE ONCE YOU HAVE NOTICE OF A FACT THAT IS SUFFICIENT TO
11 EXCITE A SUSPICION. THAT IS THE CONMAR CASE FROM THE NINTH
12 CIRCUIT, 858 F.2D AT 502. "ANY FACT THAT SHOULD EXCITE
13 SUSPICION IS DEEMED TO GIVE THE PLAINTIFF ACTUAL NOTICE OF
14 THEIR ENTIRE CLAIM."

15 AND LOOKING AT PARAGRAPH 238, WHICH IS THE PARAGRAPH THAT
16 MR. SWEDLOW ASKED YOU TO LOOK AT WHERE THERE ARE 15 ALLEGATIONS
17 THAT THEY CLAIM ARE RELATED TO FRAUDULENT CONCEALMENT, THOSE
18 ALLEGATIONS ON THEIR FACE ESTABLISH THAT THERE WAS ACTUAL
19 NOTICE WELL BEFORE THE STATUTE OF LIMITATIONS PERIOD BECAUSE
20 THERE WAS ACTUAL NOTICE OF FACTS THAT WOULD HAVE BEEN ENOUGH TO
21 EXCITE SUSPICION.

22 JUST THE FTC ORDER -- I'M HAPPY TO WALK THROUGH ALL THE
23 PARAGRAPHS, BUT JUST THE FTC CONSENT DECREE, WHICH THEY SAY
24 THEY WERE AWARE OF AND THEY SAY THEY RELIED UPON, WOULD BE
25 SUFFICIENT TO EXCITE SUSPICION.

1 THERE WERE ALLEGATIONS ABOUT CANVAS AND BEACON, THOSE WERE
2 PUBLICIZED AT THE TIME. THOSE ARE PUBLIC FACTS THAT
3 JUDGE FREEMAN FOUND IN REVEAL CHAT WOULD BE MORE THAN ENOUGH TO
4 EXCITE SUSPICION AND THEREFORE CREATE KNOWLEDGE.

5 SO WHATEVER HAPPENED WITH RESPECT TO CAMBRIDGE ANALYTICA
6 IN 2018 IS IRRELEVANT AS LONG AS THERE WAS -- AND THIS IS ONE
7 INDEPENDENT BASIS, BY THE WAY, TO DEFEAT FRAUDULENT
8 CONCEALMENT, THERE'S OTHER BASES, TOO -- BUT ONE INDEPENDENT
9 BASIS WOULD BE AS LONG AS THEY HAD ACTUAL NOTICE OF A FACT
10 UNDER CONMAR, WHICH THEY DO ACCORDING TO THEIR OWN ALLEGATIONS,
11 THAT WOULD BE ENOUGH.

12 THE OTHER ISSUES -- AND I'LL BE VERY BRIEF HERE -- THE
13 OTHER ISSUES WITH RESPECT TO THEIR FRAUDULENT CONCEALMENT
14 ALLEGATIONS ARE THE LACK OF SPECIFICITY WITH RESPECT TO THE
15 ALLEGATIONS IN PARAGRAPH 238, AND I WON'T WALK THROUGH THEM,
16 YOUR HONOR CAN LOOK AT THOSE ALLEGATIONS, BUT THEY ARE
17 GENERALIZED STATEMENTS ABOUT PRIVACY AND THERE'S NO SPECIFIC
18 ALLEGATION THAT ANY OF THEM WERE FALSE.

19 PARAGRAPH 239 LUMPS THEM ALL TOGETHER AND THEN
20 CONCLUSORILY ALLEGES THAT THEY WERE FALSE. BUT THERE'S NO
21 SPECIFIC ALLEGATION THAT THEY WERE FALSE.

22 AND THEN FINALLY, THERE'S NO ALLEGATION -- AND THIS IS
23 CRITICAL -- THAT THERE WAS ANY DILIGENCE AT ALL.

24 AND SO WHATEVER CAMBRIDGE ANALYTICA DOES OR DOES NOT TELL
25 US ABOUT REVELATIONS AS TO PRIVACY, WITH RESPECT TO THE CLAIMS

1 AT ISSUE HERE, THEIR TOLLING THEORY FAILS AT ALL THREE STEPS OF
2 THE WAY ON FRAUDULENT CONCEALMENT. INDEPENDENTLY, EACH ONE OF
3 THOSE BASES IS CONMAR AND THE FACT THAT THEY HAD ACTUAL NOTICE.

4 THE COURT: ALL RIGHT. I'LL GIVE A BRIEF RESPONSE
5 AND THEN I'D LIKE TO MOVE ON TO A NEW TOPIC.

6 MR. SWEDLOW: SO I'M NOT SURE IF FACEBOOK IS ACTUALLY
7 SAYING THAT WE HAD ACTUAL NOTICE OF THE CLAIM THAT THE D.O.J.
8 FIGURED OUT IN 2019.

9 WHAT HAPPENED WITH THE FTC CONSENT DECREE FROM 2011 AND
10 2012 IS FACEBOOK DENIED ANY WRONGDOING AND WAS CAUGHT ACTUALLY
11 LYING TO EVERYONE ABOUT WHAT THEY WERE DOING WITH THE DATA,
12 WHICH IS WHY THEY SETTLED WITH THE D.O.J. FOR \$5 BILLION IN
13 2019.

14 WE DON'T HAVE ANY OBLIGATION TO JUSTIFY DILIGENCE UP UNTIL
15 OR BEYOND DECEMBER OF 2016 BECAUSE THAT'S HOW THE STATUTE OF
16 LIMITATIONS WORK.

17 AND I DON'T WANT TO CONFUSE THE TIME THAT THE PLAINTIFFS'
18 ATTORNEYS TOOK TO DEVELOP THEIR CASE AND STRATEGY AND FILE IT
19 BECAUSE CAMBRIDGE ANALYTICA IS CLEARLY AND COMFORTABLY WITHIN
20 THE STATUTE OF LIMITATIONS PERIOD.

21 IF FACEBOOK IS SAYING THAT OUR CLAIM SHOULD BE BARRED
22 BECAUSE THEY LIED TO THE FTC WHEN THEY GOT CAUGHT FOR SOME
23 PRIVACY AND DECEPTION CONSUMER DATA VIOLATIONS IN 2011, THAT
24 BECAUSE THEY SUCCESSFULLY LIED AND DENIED IT BUT SOMEBODY GOT
25 AN INKLING OF WHAT THEY WERE DOING BACK THEN, THAT CLAIMS

1 SHOULD BE BARRED FOREVER, THEN THAT'S A WAY TO DOMINATE THE
2 MARKET AND DECEIVE CONSUMERS.

3 THAT CAN'T BE THE LAW. THE LAW CAN'T BE THERE'S A WORD
4 CALLED BEACON AND THAT WAS IN THE CONSENT DECREE, SO THE FACT
5 THAT CAMBRIDGE ANALYTICA AND ALL OF ITS REVELATIONS, YOU SHOULD
6 HAVE KNOWN THAT, CONSUMERS.

7 D.O.J. DIDN'T KNOW IT. FTC DIDN'T KNOW IT. THE U.K.
8 HOUSE OF COMMONS DIDN'T KNOW IT. CONGRESS DIDN'T KNOW IT. BUT
9 YOUR CLAIM IS BARRED BECAUSE WE GOT CAUGHT FOR THE TIP OF THE
10 ICEBERG IN 2011, LIED ABOUT IT, KEPT DOING EVERYTHING ELSE
11 UNTIL WE ACTUALLY GOT CAUGHT LATER DURING THE LIMITATIONS
12 PERIOD.

13 THAT CANNOT BE THE WAY IT WORKS AND IT'S NOT THE WAY YOU
14 FOUND IT TO WORK IN BROWN V. GOOGLE.

15 THE COURT: CAN WE GO ON TO THE MARKET ALLEGATIONS,
16 PLEASE. I HAVE A QUESTION FOR CONSUMERS.

17 WHY ARE TIKTOK AND SNAPCHAT NOT INCLUDED IN THE SOCIAL
18 NETWORK MARKET?

19 MR. SWEDLOW: WELL, TIKTOK AND SNAPCHAT JUST DON'T
20 SERVE THE SAME FUNCTION OR ROLE AS A SOCIAL NETWORK LIKE
21 FACEBOOK. YOU CAN'T -- YOU CAN'T -- YOU CAN'T CREATE THE SAME
22 KIND OF SOCIAL NET OR SOCIAL NETWORK THAT YOU CAN WITH
23 FACEBOOK.

24 NOW, TIKTOK AND SNAPCHAT ARE IN THE SOCIAL MEDIA MARKET,
25 WHICH IS -- WE'VE DEFINED TWO MARKETS. SO IT'S SIMPLY THAT THE

1 FUNCTIONALITY AVAILABLE FOR TIKTOK AND SNAPCHAT ARE NOT THE
2 SAME AS FACEBOOK AND A SOCIAL NETWORKING MARKET. AGAIN, I
3 DON'T THINK THAT'S FACTUALLY CLOSE, BUT THAT'S OUR FACTUAL
4 ALLEGATION OF DEFINING THE MARKET AND I THINK IF WE'RE JUST
5 ADOPTING SOME OF THE REASONING FROM THE DISTRICT OF D.C., EVEN
6 THOUGH IT WAS MORE ODDLY DEFINED, THE PERSONAL SOCIAL NETWORK
7 MARKET THAT WAS ACCEPTED BY THE DISTRICT COURT THERE IS A MORE
8 PARTICULARIZED DEFINITION.

9 OURS IS SIMPLY IDENTIFYING SOCIAL NETWORK AS DIFFERENT
10 FROM SOCIAL MEDIA, BUT WE'RE ALSO ACKNOWLEDGING THE EXISTENCE
11 OF THE SOCIAL MEDIA MARKET.

12 THE COURT: ALL RIGHT. BUT YOUR DEFINITION IS PRETTY
13 BROAD. BUT LET -- YOU KNOW, ALLOWING USERS TO COMMUNICATE AND
14 INTERACT WITH FRIENDS.

15 BUT LET ME MOVE TO MY NEXT TOPIC.

16 DO YOU HAVE ANY CASE THAT SAYS THAT A PERCENTAGE OF
17 ADVERTISING REVENUE IS A GOOD PROXY FOR PERCENTAGE OF SOCIAL
18 MEDIA MARKET?

19 MR. SWEDLOW: SO, NO. BUT IF I COULD JUST GIVE A
20 MORE COMPLETE ANSWER THAN JUST NO?

21 THE COURT: OKAY.

22 MR. SWEDLOW: WHAT -- I THINK THE INQUIRY HERE IS
23 THAT THE MARKET POWER OR MARKET SHARE THAT WAS CONSIDERED IN
24 THE FTC CASE WAS -- THIS IS ON PAGE 27 OF THE FTC CASE -- ALL
25 THE FTC ALLEGED WAS THAT THEY, QUOTE, MAINTAINED -- THAT

1 FACEBOOK MAINTAINED A DOMINANT SHARE OF THE U.S. PERSONAL
2 SOCIAL NETWORKING MARKET, AND THEN IT PARENTHETICALLY SAID, IN
3 EXCESS OF 60 PERCENT, AND NOTHING ELSE.

4 WHAT THE COURT SAID ON THE NEXT PAGE, ON 28, IS "IT IS
5 HARD TO IMAGINE A MARKET SHARE ALLEGATION THAT IS MUCH MORE
6 CONCLUSORY THAN THE FTC HERE." THAT WAS AT THE TIME THEY
7 ALLEGED IT BECAUSE THEY BELIEVED THAT WAS SUFFICIENT. THE
8 COURT SAID IT WASN'T.

9 IN CONTRAST, OUR COMPLAINT ALLEGES A BUNCH OF DIFFERENT
10 WAYS THAT YOU COULD MEASURE MARKET SHARE, INCLUDING, BUT NOT
11 LIMITED TO, ADVERTISING REVENUE.

12 AND LET ME JUST BE CLEAR OF HOW IT'S ALLEGED AND WHAT
13 WE'RE ARGUING HERE TODAY. ADVERTISING REVENUE IS NOT A PROXY
14 OR THE DEFINITION OF THE MARKET SHARE BECAUSE IT'S A DIFFERENT
15 MARKET. BUT IT'S INFORMATIVE AND FACEBOOK CONSIDERS IT
16 INFORMATIVE OF WHAT THE MARKET SHARE OF THE RELEVANT MARKET IS.

17 IN OTHER WORDS, IF YOU ARE A SOCIAL MEDIA COMPANY LIKE
18 FACEBOOK AND YOU COMPETE WITH OTHER SOCIAL MEDIA COMPANIES LIKE
19 SNAPCHAT AND TWITTER AND LINKEDIN OR WHATEVER IT IS, IF YOU
20 INTERNALLY IDENTIFY THAT YOU GET 85 PERCENT OF THE ADVERTISING
21 REVENUE AND THAT'S HOW YOU ARE APPROXIMATING YOUR MARKET SHARE,
22 THEN IT'S RELEVANT FOR THE INQUIRY. IT IS NOT THE DEFINITION
23 OF MARKET SHARE, BUT IT'S RELEVANT FOR THE INQUIRY.

24 IT'S SIMILARLY FOR THE TIME SPENT ON SOCIAL MEDIA OR
25 SOCIAL NETWORKS. FACEBOOK, IN ITS INTERNAL DOCUMENTS, WHICH WE

1 QUOTE, IDENTIFIES TIME SPENT AS A RELEVANT METRIC.

2 WHAT WE DID IN OUR COMPLAINT, WHICH IS WHAT THE FTC ORDER
3 SAYS THE FTC DIDN'T DO, IS WE TOOK SPECIFIC POSITIONS ON MARKET
4 SHARE PERCENTAGES BASED ON SPECIFIC METRICS. ONE OF THOSE
5 METRICS IS TIME SPENT. ANOTHER ONE IS ADVERTISING REVENUE.

6 BUT WE'RE NOT SAYING THAT EITHER ARE DEFINITIVE OR
7 IRREBUTTABLE. WE'RE SAYING, FOR PURPOSES OF OUR PLEADING, WE
8 DID ACTUALLY IDENTIFY FACEBOOK'S MARKET SHARE IN THE TWO
9 RELEVANT MARKETS, AND WE IDENTIFIED WHAT WE BASED THAT ON,
10 WHICH WAS MARKET STUDIES AND FACEBOOK'S OWN MARKET STUDIES.

11 SO IT ISN'T THAT THERE'S A CASE THAT SAYS ADVERTISING
12 REVENUE IS GOOD ENOUGH. IT'S THAT ADVERTISING REVENUE IS
13 RELEVANT TO THE MARKET SHARE AND WE USED IT AS FACTS RELEVANT
14 TO THE DEFINITION OF THE MARKET SHARE.

15 IN TERMS OF THE TIME SPENT ONE THOUGH, PART OF THE
16 ALLEGATION OF DECEPTION IS THAT FACEBOOK ACQUIRED A COMPANY
17 THAT TRACKS PEOPLE WHO LEFT FACEBOOK AND SPENT TIME IN OTHER
18 APPS, OTHER SOCIAL MEDIA AND POTENTIALLY SOCIAL NETWORK APPS,
19 AND THEY TRACKED THAT TIME TO FIGURE OUT, HOW DOES FACEBOOK'S
20 MARKET SHARE OF SOCIAL MEDIA COMPARE?

21 THAT'S -- OUR ALLEGATION IS THAT FACEBOOK VALUED THAT AS A
22 RELATIVE AND COMPARATIVE METRIC FOR MARKET SHARE, AND SO WE
23 IDENTIFIED IT FROM FACEBOOK'S OWN DOCUMENTS AS DEMONSTRATING
24 DOMINANCE AND MARKET SHARE.

25 THE COURT: LET ME ASK FACEBOOK, IN REVEAL CHAT,

1 JUDGE FREEMAN SAID THAT THE BOUNDARIES OF THE SOCIAL DATA
2 MARKET SHOULD BE DECIDED ON A MORE CLEARLY DEVELOPED FACTUAL
3 RECORD.

4 DO YOU DISAGREE WITH THAT? IS IT SOMETHING THAT SHOULD BE
5 DECIDED AT THE MOTION TO DISMISS STAGE?

6 MR. PANNER: YOUR HONOR, THIS IS AARON PANNER. I'LL
7 BE ADDRESSING THAT ISSUE FOR FACEBOOK.

8 IN REVEAL CHAT, OF COURSE, JUDGE FREEMAN DIDN'T NEED TO
9 DECIDE THAT ISSUE BECAUSE SHE DISMISSED THAT CASE WITHOUT
10 PREJUDICE IN REVEAL CHAT I AND ULTIMATELY DIDN'T ADDRESS IT IN
11 REVEAL CHAT II.

12 WHAT SHE SAID ABOUT THE SOCIAL DATA MARKET, WHICH IS A
13 DIFFERENT CONSTRUCT FROM WHAT THE CONSUMERS HAVE ALLEGED HERE,
14 IS THAT SHE WAS WILLING TO HEAR MORE ABOUT IT AT A LATER STAGE
15 IF THE CASE PROCEEDED, AND OF COURSE THAT TURNED OUT TO BE
16 DICTA.

17 NOTABLY, WITH REGARD TO THE ADVERTISING MARKET, SHE
18 INDICATED THAT SHE DIDN'T SEE ENOUGH AND WANTED TO MAKE SURE
19 THAT THERE WERE ADEQUATE FACTS PLEADED WITH REGARD TO THE
20 NATURE OF AN ADVERTISING MARKET WHICH, AGAIN, DIDN'T NEED TO BE
21 REACHED IN REVEAL CHAT II.

22 BUT CERTAINLY IN THIS CASE, THE NATURE OF THE MARKETS THAT
23 HAVE BEEN ALLEGED BOTH FROM THE POINT OF VIEW OF MARKET
24 DEFINITION -- SPEAKING NOW TO THE CONSUMER, TO THE USER CASE --
25 BOTH WITH RESPECT TO MARKET DEFINITION AND MARKET POWER ARE

1 INADEQUATE.

2 AND I THINK, IF YOUR HONOR WOULD ALLOW ME, I'LL JUST SPEAK
3 VERY BRIEFLY TO THE COMPARISON TO JUDGE BOASBERG'S DECISION IN
4 THE FTC CASE BECAUSE I THINK IT REVEALS A FUNDAMENTAL PROBLEM
5 WITH WHAT THE USERS HAVE ALLEGED HERE.

6 THE USERS HERE ADMIT THAT FACEBOOK IS COMPETING WITH
7 YOUTUBE AND TIKTOK AND SNAPCHAT AND TWITTER AND IMESSAGE AND
8 ANY NUMBER OF SOCIAL, WHAT THEY CALL SOCIAL MEDIA APPS.

9 THE COMPETITION IS EVEN BROADER BASED ON THE ALLEGATIONS
10 IN THE COMPLAINT BECAUSE WHAT THEY SAY IS FACEBOOK IS USED FOR
11 ENTERTAINMENT AND FOR KILLING TIME, AND OF COURSE THERE'S MANY
12 DIFFERENT APPLICATIONS THAT A USER CAN REACH SIMPLY BY PRESSING
13 AN ICON ON THEIR PHONE IF THEY WANT TO BE ENTERTAINED OR KILL
14 TIME.

15 AND SO THE PROBLEM WITH THE ALLEGATIONS HERE -- SO THE WAY
16 THAT THE FTC TRIED TO GET OUT OF THAT PROBLEM IS IT SAID, WE'RE
17 ACTUALLY GOING TO LIMIT OUR MARKET TO A PARTICULAR
18 FUNCTIONALITY, A PARTICULAR FEATURE OF FACEBOOK, WHICH WE'RE
19 GOING TO DUB PERSONAL SOCIAL NETWORKING, AND ALL OF THE OTHER
20 THINGS THAT PEOPLE DO ON FACEBOOK, THAT'S NOT PART OF OUR
21 MARKET.

22 AND IN DOING THAT, THE COURT SAID, OKAY, I UNDERSTAND WHAT
23 YOU'RE SAYING ABOUT THAT FUNCTIONALITY. IT'S THIN, BUT I'M
24 GOING TO ALLOW IT. BUT NOW YOU HAVE NO ABILITY TO ALLEGE
25 MARKET POWER BECAUSE I DON'T KNOW HOW -- YOU KNOW, WHAT YOU'RE

1 MEASURING WHEN YOU TALK ABOUT A SHARE OF A MARKET.

2 NOW, WHAT THE -- WHAT PLAINTIFFS HAVE DONE HERE IS THEY'VE
3 SAID, WELL, ACTUALLY, WE'RE TALKING ABOUT EVERYTHING THAT YOU
4 DO ON FACEBOOK.

5 BUT THEN THEY HAVE NO BASIS TO SAY THAT ALL OF THE OTHER
6 APPS, WHICH THEY CONCEDE PROVIDE COMPETITIVE FEATURES TO
7 PRECISELY WHAT THEY SAY IS WITHIN THE MARKET, THEY HAVE NO
8 BASIS TO SAY THAT'S NOT PART OF THE MARKET. THEY HAVE NO BASIS
9 FOR SAYING THAT THERE'S, THERE'S A SEPARATE MARKET FOR SOCIAL
10 NETWORK, FOR SOCIAL NETWORKS.

11 THEY ALSO FAIL TO ALLEGE MARKET POWER BECAUSE,
12 NOTWITHSTANDING WHAT MR. SWEDLOW HAS SAID, THEIR ALLEGATIONS
13 ARE EQUALLY CONCLUSORY WITH REGARD TO THE MARKET. WHAT THEY
14 SAY IS IT'S MORE THAN 65 PERCENT. THEY DON'T EXPLAIN HOW
15 THEY'VE MEASURED THAT. THEY DON'T EXPLAIN WHAT'S IN THE
16 DENOMINATOR.

17 AND I THINK WHAT'S, WHAT'S KEY IS, YOU KNOW, THE STATEMENT
18 ABOUT ADVERTISING REVENUE, AS JUDGE BOASBERG INDICATED, IT'S
19 ACTUALLY IRRELEVANT TO THE NATURE OF THE MARKET THAT THEY'VE
20 ALLEGED, WHICH IS A USER SIDE MARKET. THERE COULD BE A --
21 THERE COULD BE A SERVICE THAT DOESN'T RECEIVE ANY ADVERTISING
22 REVENUE THAT'S A MAJOR COMPETITOR ON THE USER SIDE. AND SO
23 ADVERTISING REVENUE ACTUALLY DOESN'T TELL YOU ANYTHING ABOUT
24 MARKET SHARE.

25 AND SO THERE'S REALLY A FUNDAMENTAL PROBLEM WITH THE --

1 WITH BOTH THE MARKET DEFINITION AND THE MARKET POWER, MARKET
2 SHARE ALLEGATIONS IN THE CONSUMER COMPLAINT.

3 THE COURT: ALL RIGHT. THANK YOU.

4 I'M GOING TO GIVE YOU A VERY QUICK OPPORTUNITY TO RESPOND,
5 MR. SWEDLOW, AND THEN I'D LIKE TO GO TO THE SOCIAL ADVERTISING
6 MARKET, PLEASE.

7 MR. SWEDLOW: OKAY.

8 WHAT HAPPENED IN THE FTC CASE IS THAT THE FTC IDENTIFIED
9 NOTHING, THEY DIDN'T IDENTIFY ANY PERCENTAGE OF ANY REVENUE OR
10 TIME SPENT. THE JUDGE WAS TRYING TO IDENTIFY WHAT THEY COULD
11 HAVE DONE AND THEY DIDN'T DO. THEY DIDN'T DO ANY OF IT. WHAT
12 THE COURT SAID IS THAT THEY DIDN'T EVEN PROVIDE AN ESTIMATED
13 ACTUAL FIGURE OR RANGE FOR FACEBOOK'S MARKET SHARE AT ANY POINT
14 OVER THE PAST TEN YEARS. THE FTC DIDN'T DO ANYTHING.

15 WHAT WE DID, STARTING WITH PARAGRAPH 286, IS IDENTIFY FROM
16 FACEBOOK'S DOCUMENTS AND FACEBOOK'S DATA WHAT THEY BELIEVE
17 THEIR RELEVANT MARKET SHARE ARE FOR THE TWO MARKETS THAT THE
18 HOUSE REPORT ACTUALLY RECOGNIZED AS MARKETS. THAT'S THE SOCIAL
19 NETWORK AND THE SOCIAL MEDIA MARKETS. WE DIDN'T INVENT THESE
20 MARKETS.

21 I'LL ALSO ADD, WE FILED OUR COMPLAINT FIRST, SO IT ISN'T
22 LIKE WE TRIED TO FIX WHAT THE FTC DID IN THEIR COMPLAINT. WE
23 FILED OUR COMPLAINT. WE DEFINED OUR MARKET. WE JUSTIFIED OUR
24 PERCENTAGES.

25 THE FTC DIDN'T BELIEVE THEY NEEDED TO, AND IN THEIR FIRST

1 DRAFT OF THEIR FIRST COMPLAINT, THEY DIDN'T. THEY MAY IN THE
2 NEXT COMPLAINT. THEY MAY CHOOSE TO CITE PERCENTAGES OVER THE
3 PAST TEN YEARS.

4 WE DID. WE IDENTIFIED WHY TIME SPENT IS RELEVANT, WHY
5 ADVERTISING REVENUE IS RELEVANT, AND THAT CAN BE DISPUTED LATER
6 IN THE CASE AS A FACTUAL DISPUTE, BUT WE DID WHAT THE JUDGE IN
7 THE FTC CASE SAID THE FTC NEEDS TO DO, WHICH IS SOMETHING
8 BEYOND SAYING SIMPLY THEY HAVE MARKET POWER.

9 THE COURT: LET'S GO TO THE SOCIAL ADVERTISING
10 MARKET, AND THESE ARE QUESTIONS FOR COUNSEL FOR THE PLAINTIFFS.

11 WHO'S GOING TO ANSWER? IS THAT YOU, MR. BATHAEE?

12 MS. ANDERSON: GOOD AFTERNOON, YOUR HONOR. I'LL BE
13 ADDRESSING THOSE.

14 THE COURT: OKAY, GREAT. THANK YOU.

15 SO CAN YOU DISTINGUISH THE NINTH CIRCUIT DECISION IN
16 HICKS V. PGA TOUR, WHICH DECLINED TO RECOGNIZE A MARKET THAT
17 WAS LIMITED TO A SINGLE TYPE OF ADVERTISING?

18 MS. ANDERSON: YES. HICKS REJECTED THE PLAINTIFFS'
19 PRODUCT MARKET BECAUSE THE PLAINTIFF ATTEMPTED TO NARROW THE
20 MARKET DEFINITION TO A SUBMARKET OF THE SUBMARKET OF A
21 SUBMARKET, AND THIS WAS ONE OF THOSE MARKET DEFINITIONS THAT
22 JUST WASN'T PLAUSIBLE ON ITS FACE.

23 SO THE MARKET THAT THE HICKS PLAINTIFFS TRIED TO DEFINE
24 WAS SUBDIVIDED IN THREE WAYS FROM GENERAL ADVERTISING. IT WAS
25 IN PLAY, WHICH IS BETWEEN COMMERCIALS; ADVERTISING ON

1 TELEVISION; AND DIRECTED AT GOLF SPACE.

2 SO THE SUBCLASSES IN HICKS ARE A SUBSTANTIALLY DIFFERENT
3 SCOPE FROM THOSE ALLEGED BY THE ADVERTISERS. WE PROPOSE A
4 STRAIGHTFORWARD SUBMARKET OF THE OVERALL ADVERTISING SUBMARKET,
5 AND WE ALLEGE FACTS REGARDING REASONABLE INTERCHANGEABILITY AND
6 LOW CROSS-ELASTICITY OF DEMAND, AND OUR ALLEGATIONS ARE
7 SUPPORTED BY ROBUST BROWN SHOE FACTORS SHOWING THE ECONOMIC
8 DISTINCTNESS OF A SOCIAL ADVERTISING MARKET FROM OTHER FORMS OF
9 ADVERTISING.

10 AND MANY COURTS HAVE FOUND MORE GENERALLY DRAWN SUBMARKETS
11 WITHIN THE GENERAL ADVERTISING MARKET TO BE SUFFICIENT MARKET
12 DEFINITIONS, AND WE LAID OUT THOSE CASES IN FOOTNOTE 23 OF OUR
13 BRIEF ON PAGE 20.

14 THE COURT: SO WHY IS SOCIAL ADVERTISING DIFFERENT
15 FROM SEARCH BASED ADVERTISING?

16 MS. ANDERSON: SOCIAL ADVERTISING USES DATA FROM
17 SOCIAL NETWORKS TO TARGET USERS FOR ADS BASED ON THE REAL
18 IDENTITIES, THEIR ATTRIBUTES, BEHAVIORS, AND GROUP MEMBERSHIPS.

19 WHAT'S UNIQUE ABOUT SOCIAL ADVERTISING IS THE RICH SOCIAL
20 DATA THAT ALLOWS ADVERTISERS TO TARGET ADS TO INDIVIDUALS BASED
21 ON WHAT THEY SHARE OR VIEW ON A SOCIAL NETWORK, SUCH AS THEIR
22 EDUCATION LEVEL, WHERE THEY LIVE, WHAT THEY BUY, WHO THEIR
23 FRIENDS ARE, WHAT THEIR HOBBIES AND INTERESTS ARE, AND WHAT
24 GROUPS THEY BELONG TO.

25 AND MACHINE LEARNING ALGORITHMS USED IN SOCIAL ADVERTISING

1 ALSO ALLOW ADVERTISERS TO SEEK OTHER USERS WITH SIMILAR
2 BEHAVIOR OR CHARACTERISTICS. SO THE ABILITY TO TAILOR AN
3 AUDIENCE SPECIFICALLY TO AN AD SETS SOCIAL ADVERTISING APART
4 FROM SEARCH ADVERTISING.

5 A SEARCH ADVERTISEMENT IS DISPLAYED IN RESPONSE TO A
6 SEARCH THAT YOU ENTER INTO A WEB BROWSER, AND SEARCH
7 ADVERTISING LACKS THE TARGETING FEATURES OF SOCIAL ADVERTISING.
8 THE AD IS POSTED JUST BASED ON WHAT THE SEARCH TERMS ARE. SO
9 THE SEARCH ADVERTISING LACKS THESE TARGETED FEATURES OF A --

10 THE COURT: OH, I'M GOING TO HAVE TO DISAGREE WITH
11 YOU. I'VE HAD SO MANY CASES, THE SEARCH ENGINES ARE DOING
12 TARGETED ADVERTISING BASED ON USER PROFILES AND, IF ANYTHING,
13 THEY'RE GETTING EVEN MORE INFORMATION FROM SCANNING E-MAILS AND
14 WHATNOT. SO I -- I WOULD JUST HAVE TO DISAGREE WITH YOU THERE.

15 YOU'RE SAYING NO SEARCH ADVERTISING IS TARGETED BASED ON
16 USER PROFILES?

17 MS. ANDERSON: LATER IN THE CLASS PERIOD, I BELIEVE
18 AS WE EXPLAINED IN OUR COMPLAINT, THE TARGETING FEATURES OF
19 DISPLAY AND SEARCH ADVERTISING WERE BECOMING, WERE BECOMING
20 BETTER AND POTENTIALLY CONVERGING WITH THE SOCIAL ADVERTISING
21 MARKET.

22 BUT FOR MOST OF THE CLASS PERIOD, OUR ALLEGATIONS ARE THAT
23 THE TARGETING FEATURES OF SEARCH ADVERTISING JUST DON'T COMPETE
24 WITH THE RICH DATA THAT YOU GET WHEN SOCIAL ADVERTISING.

25 THE COURT: SO WHEN DO YOU THINK SEARCH ENGINES

1 STARTED TARGETED ADVERTISING?

2 MS. ANDERSON: OUR COMPLAINT ALLEGES THAT THE
3 CONVERGING OF THE MARKETS BEGAN SOMETIME AROUND 2017 TO 2018.

4 THE COURT: ALL RIGHT. WELL -- SO YOU'RE SAYING
5 SEARCH BASED ENGINES DID NO TARGETED ADVERTISING BEFORE 2017?
6 THAT'S YOUR ALLEGATION?

7 MS. ANDERSON: OUR ALLEGATION IS THAT THE SEARCH
8 ADVERTISING, IT LACKS THE RICH FEATURES OF THE SOCIAL
9 ADVERTISING, AND THAT IN 2017/2018, THE MARKETS STARTED TO
10 CONVERGE WITH THE TARGETING, FOR EXAMPLE, THAT GOOGLE HAS FROM
11 ITS PRODUCTS.

12 THE COURT: SO YOU'RE SAYING GOOGLE DIDN'T DO
13 TARGETED ADVERTISING BEFORE 2017?

14 MS. ANDERSON: NOT TO THE EXTENT THAT THERE'S
15 TARGETED ADVERTISING IN SOCIAL ADVERTISING WHERE YOU CAN
16 ADVERTISE BASED ON HOW, HOW USERS INTERACT WITHIN NETWORKS,
17 WHAT THEY SHARE, THEIR INTERESTS AND THEIR HOBBIES, THEIR
18 RELATIONSHIP STATUS OR EDUCATION.

19 IT'S A DIFFERENT LEVEL OF SOCIAL -- OF -- IT'S A DIFFERENT
20 LEVEL OF TARGETING.

21 THE COURT: WHAT'S YOUR POSITION ON THE DISTRICT
22 COURT DECISIONS IN KINDERSTART.COM LLC AND IN RE: GOOGLE
23 ADVERTISING?

24 MS. ANDERSON: IN KINDERSTART, WE THINK THAT CASE IS
25 FACTUALLY DISTINGUISHABLE. FIRST OF ALL, IT'S NEARLY 15 YEARS

1 OLD. IT WAS ANALYZING ONLINE ADVERTISING WHEN IT WAS IN ITS
2 INFANCY. THE IPHONE DID NOT EXIST YET WHEN KINDERSTART WAS
3 DECIDED, AND THERE WEREN'T MOBILE APPS YET WHEN KINDERSTART WAS
4 DECIDED.

5 IN ADDITION, THE OPERATIVE COMPLAINT IN KINDERSTART, IT
6 DIDN'T DISCUSS THE BRANDISHING FACTORS, IT DIDN'T ADDRESS
7 REASONABLE INTERCHANGEABILITY OR CROSS-ELASTICITY OF DEMAND,
8 AND THE PLAINTIFFS IN THAT CASE SIMPLY DID NOT MARSHAL THE KIND
9 OF ROBUST FACTUAL SUPPORT FOR THEIR MARKET DEFINITION THAT
10 ADVERTISER PLAINTIFFS DO HERE WITH OUR BROWN SHOE FACTORS.

11 WITH REGARD TO IN RE: DIGITAL MUSIC, THE ANSWER IS VERY
12 SIMILAR. THE COMPLAINT THERE DID NOT DISCUSS ANY OF THE
13 BROWN SHOE FACTORS, AND IT DID NOT DISCUSS REASONABLE
14 INTERCHANGEABILITY OR CROSS-ELASTICITY OF DEMAND. SO WE WOULD
15 DISTINGUISH THAT CASE BASED ON THE FACTUAL SUPPORT WE ALLEGE IN
16 OUR COMPLAINT.

17 THE COURT: I ASKED ABOUT IN RE: GOOGLE ADVERTISING.
18 IS --

19 MS. ANDERSON: YEAH, IN RE: GOOGLE DIGITAL
20 ADVERTISING BEFORE JUDGE FREEMAN.

21 THE COURT: YES.

22 MS. ANDERSON: IN THAT CASE, THE -- AGAIN, THE
23 OPERATIVE COMPLAINT JUST DOESN'T HAVE THE FACTUAL ALLEGATIONS
24 THAT OURS HAS.

25 AND IN ADDITION, THAT COMPLAINT WAS DISMISSED WITH LEAVE

1 TO AMEND SO THE PLAINTIFFS COULD SHOW -- ALLEGE ADDITIONAL
2 FACTS REGARDING SOCIAL ADVERTISING AND WHY IT MAY NOT BE A
3 SUBSTITUTE.

4 THE COURT: LET ME GO TO, I GUESS, EITHER -- I
5 PROBABLY SHOULD GO TO THE ADVERTISERS. I DON'T KNOW WHETHER
6 THE CONSUMERS WILL WANT TO SAY ANYTHING.

7 BUT IN THE FTC CASE IN D.C., THE DISTRICT JUDGE SAID
8 WITHHOLDING API ACCESS FROM COMPETITORS WAS NOT UNLAWFUL, AND
9 SIMILARLY IN REVEAL CHAT, JUDGE FREEMAN SAID THAT THE APP
10 DEVELOPERS HADN'T STATED A CLAIM REGARDING FACEBOOK'S PLATFORM.

11 WOULD YOU LIKE TO RESPOND TO THOSE TWO FINDINGS? I DON'T
12 KNOW WHO'S GOING TO ANSWER THAT QUESTION.

13 MR. BATHAEE: YEAH, I'LL ANSWER THAT QUESTION, YOUR
14 HONOR.

15 YOU KNOW, THIS CASE IS EXTREMELY DIFFERENT, AND HERE'S
16 WHY: WE HAVE DETAILED ALLEGATIONS THAT FIT WITHIN EVERY
17 ELEMENT OF ASPEN, AND IN FACT, YOUR HONOR, I SUBMIT
18 RESPECTFULLY THIS IS THE STRONGEST ASPEN CASE SINCE ASPEN, AND
19 LET ME START WITH THE THREE POINTS THAT WE HAVE TO SHOW.

20 UNILATERAL TERMINATION OF VOLUNTARY AND PROFITABLE COURSE
21 OF DEALING; TWO, THE ONLY CONCEIVABLE RATIONALE OR PURPOSE IS
22 TO SACRIFICE SHORT-TERM BENEFITS OR OBTAIN PROFITS IN THE LONG
23 RUN FROM THE EXCLUSION OF COMPETITION; AND, THREE, THE REFUSAL
24 TO DEAL WITH THE PRODUCTS THE DEFENDANT ALREADY SELLS IN THE
25 EXISTING MARKET TO SIMILARLY SITUATED CUSTOMERS.

1 BUT THERE'S ONE THING THAT'S REALLY IMPORTANT IN EVERY
2 ASPEN CASE, AND THAT'S THAT ELEMENT OF IRRATIONALITY. AND IN
3 ASPEN, AS YOUR HONOR KNOWS FULL WELL FROM THE QUALCOMM CASES,
4 IN ASPEN ITSELF, THEY WOULDN'T SELL AT FULL PRICE. WHY? WHY
5 WOULD THEY DO THAT? AND THE ANSWER WAS TO GET RID OF A
6 COMPETITOR.

7 AND WE HAVE THAT HERE. WE HAVE CONDO, WHICH INTERNALLY
8 FACEBOOK'S OWN SENIOR TECHNICAL PEOPLE, AND EXECUTIVES IN
9 CHARGE OF THE PLATFORM, SAY HAD NO TECHNICAL JUSTIFICATION
10 OTHER THAN TO EXCLUDE COMPETITORS, AND I'LL GET TO THAT IN A
11 SECOND.

12 BUT THE VERY FIRST ELEMENT, YOUR HONOR, IS EASILY MET.

13 THE COURT: I'M SORRY. LET ME SPEED THIS UP HERE.

14 MR. BATHAEE: YEAH.

15 THE COURT: WHAT WAS IT THAT WAS EITHER NOT RAISED
16 BEFORE THE OTHER TWO JUDGES OR THAT -- I MEAN, WHAT'S YOUR
17 POSITION? DO YOU THINK THOSE TWO JUDGES JUST GOT IT WRONG? OR
18 DO YOU THINK THAT THERE WERE EITHER ARGUMENTS OR FACTS THAT
19 SHOULD HAVE BEEN BEFORE THOSE JUDGES? WHAT'S YOUR --

20 MR. BATHAEE: YOUR HONOR, THEY DIDN'T PLEAD THE FACTS
21 THAT WE PLEAD IN THIS COMPLAINT. IT WAS A VERY GENERAL
22 ARGUMENT THAT THERE WAS A GENERAL DUTY TO DEAL, AND THEN THERE
23 WAS EVEN AN ARGUMENT ABOUT CONDITIONAL DEALING, WHICH IS A
24 TERM, AS AN ANTITRUST LAWYER, I'D NEVER HEARD OF. I THINK IT
25 CAME FROM A LAW REVIEW ARTICLE.

1 AND THE COURT GENERALLY SAID THIS: IT SAID, LOOK, THERE'S
2 NO GENERAL DUTY TO DEAL AND YOU REALLY HAVEN'T EXPLAINED HOW
3 YOU FIT INTO ASPEN. I DON'T HAVE TO REACH IT BECAUSE LACHES
4 BARS AN INJUNCTION AND THAT'S WHAT YOU WANT.

5 AND THE COURT DID SAY, VERY CLEARLY IN D.C., YEAH, THERE
6 ARE CASES WHERE REFUSAL TO DEAL, YOU KNOW, MAY VIOLATE ASPEN
7 SKIING. BUT IT DIDN'T REACH THAT POINT.

8 AND OF COURSE JUDGE FREEMAN, YOU KNOW, I THINK -- I MEAN,
9 I DON'T KNOW BECAUSE SHE NEVER REACHED IT IN REVEAL II, BUT I
10 THINK I CONVINCED HER ON THE ARGUMENT ON ASPEN AND HER REAL
11 ISSUE WAS THAT THIRD ELEMENT, WHICH I CAN GET TO.

12 BUT THE FACTS HERE ARE SIMILAR TO REVEAL. REVEAL DIDN'T
13 REALLY PASS ON THEIR SUFFICIENCY IN THE END.

14 BUT I CAN GET INTO HOW WE MEET EACH ONE OF THESE ELEMENTS.
15 I THINK WE MEET THEM VERY CLEARLY AND WITH SPECIFICITY, WHICH
16 IS SOMETHING VERY HARD TO DO IN AN ASPEN CASE BECAUSE WE
17 ACTUALLY DON'T KNOW WHAT DRIVES THE MONOPOLIST'S CONDUCT
18 USUALLY. WE DON'T HAVE THAT INSIGHT.

19 WE DO. WE HAVE THEM -- WE HAVE THEM SEVERING THE
20 VOLUNTARY COURSE, PROFITABLE COURSE OF DEALING, AND HERE'S WHAT
21 THEY SAID IN THEIR OWN IPO DISCLOSURES TO THEIR INVESTORS:
22 "OUR PLATFORM SUPPORTS OUR ADVERTISING BUSINESS BECAUSE APPS ON
23 FACEBOOK CREATE ENGAGEMENT THAT ENABLES US TO SHOW ADS; OUR
24 PLATFORM DEVELOPERS MAY PURCHASE ADVERTISING."

25 THE COURT: YOU ARE NOT ASKING ME TO -- YOU'RE NOT

1 CITING MY RULING IN FTC V. QUALCOMM, ARE YOU, ON THIS ASPEN
2 POINT? BECAUSE I VERY MUCH GOT SLAPPED DOWN ON THAT BY THE
3 NINTH CIRCUIT. SO --

4 MR. BATHAEE: WELL, YOUR HONOR, THE NINTH CIRCUIT'S
5 REASONING WAS, WAS VERY TAILORED TO THE LICENSING SCHEME THERE,
6 AND HERE WE DO ACTUALLY HAVE PRETTY CLEAR EVIDENCE THAT
7 FACEBOOK WAS MAKING MONEY WITH -- FROM THESE DEVELOPERS DURING
8 THE RELEVANT PERIOD AND THEN IT CEASED THE CONDUCT.

9 AND IF -- THE PORTION I WAS READING TO YOUR HONOR IS
10 STRAIGHT FROM -- IS STRAIGHT FROM THEIR OWN INVESTOR
11 DISCLOSURES, THAT THEY MAKE MONEY OFF OF IT.

12 BUT THEIR OWN INTERNAL DOCUMENTS SAY THE SAME THING.
13 PARAGRAPH 107, ZUCKERBERG --

14 THE COURT: BUT WOULDN'T YOU THINK THAT IN
15 FTC V. QUALCOMM, THE ARGUMENT WOULD EVEN BE STRONGER BECAUSE
16 THOSE ARE STANDARD ESSENTIAL PATENTS, YOU KNOW, THAT QUALCOMM
17 MADE FRAND, FAIR AND NON-DISCRIMINATORY REASONABLE LICENSING
18 OBLIGATIONS AS A MEMBER OF THAT STANDARD SETTING BODY, AND
19 THERE -- IF THE COURT IS NOT GOING TO FIND IT IN THAT INSTANCE,
20 WHY WOULD IT FIND IT HERE?

21 MR. BATHAEE: WELL, YOUR HONOR --

22 THE COURT: IF ANYTHING, STANDARD ESSENTIAL PATENTS,
23 FRAND OBLIGATIONS TO A STANDARD SETTING BODY AND INTEGRATED
24 PRODUCTS WHERE EVERYONE IS -- THE WHOLE PURPOSE OF A STANDARD
25 SETTING BODY IS TO CREATE A PRODUCT THAT IS INTERCHANGEABLE AND

1 A LOT OF DIFFERENT COMPANIES CAN CONTRIBUTE THEIR PARTS.

2 MR. BATHAEE: YOUR HONOR, THE COURT PUT EMPHASIS ON
3 THE FACT THAT THERE WAS AN AGREEMENT TO SELL ON -- TO LICENSE
4 ON A FRAND BASIS, BUT NO ACTUAL EVIDENCE OF THOSE SALES
5 HAPPENING UPSTREAM. AND, AND I THINK THEY SAID, WELL, THE
6 COURT HAD POINTED TO ONLY ONE SPECIFIC PIECE OF EVIDENCE THAT
7 WAS VAGUE AND EARLIER IN TIME.

8 WE HAVE VERY DIFFERENT ALLEGATIONS HERE. WE ACTUALLY HAVE
9 INTERNAL DOCUMENTS SAYING THEY'RE MAKING \$0.70 PER GAME
10 INSTALL, FOR EXAMPLE, FROM THESE APPS THAT THEY END UP KILLING.
11 THAT'S IN PARAGRAPH 115.

12 WE HAVE EVIDENCE, DIRECT EVIDENCE THAT THEY WERE MAKING
13 MONEY FROM ADS FROM THESE DEVELOPERS THAT THEY THEN THREW OFF
14 THEIR PLATFORM. THEY WERE GETTING ENGAGEMENT FROM THE APPS
15 THAT THEY THREW OFF THEIR PLATFORM.

16 THERE'S ACTUAL, ACTUAL MONEY CHANGING HANDS. IT'S
17 PROFITABLE FOR THEM.

18 AND THEY SAY, HEY, I DON'T WANT THAT PROFIT BECAUSE I
19 WOULD MUCH RATHER GET RID OF MY COMPETITORS.

20 AND THIS IS MUCH LIKE THE NOVELL V. MICROSOFT CASE. IN
21 THAT CASE THE TENTH CIRCUIT DID SAY THAT'S, THAT -- THAT THIS
22 SORT OF THING IS ENOUGH. THEIR API'S WERE REMOVED FROM
23 WINDOWS 95 TO HURT A PARTICULAR COMPETITOR DURING THE BETA
24 PHASE, AND THE COURT SAID, WELL, THE FACT THAT YOU'RE THROWING
25 OFF ONE OF YOUR LEAD DEVELOPERS BEFORE A MAJOR RELEASE OF

1 WINDOWS 95, YEAH, THAT'S THE KIND OF SHOOTING YOURSELF IN THE
2 FOOT THAT WE SEE IN ASPEN.

3 AND WE HAVE THAT HERE. WE HAVE THEM MAKING CASH FROM
4 THESE DEVELOPERS THROUGH ADVERTISING, THROUGH INSTALL APPS, ON
5 A PER INSTALL BASIS. THEY WERE EVEN CONSIDERING CHARGING FOR
6 THE API'S THEMSELVES, FOR THE ACCESS TO THE API'S THEMSELVES.
7 THEY PRESENTED IT TO THEIR BOARD OF DIRECTORS, AND THEY DECIDED
8 THEY'RE GOING TO STOP DOING IT AND GET RID OF THAT MONEY AND
9 THAT ENGAGEMENT THEY GOT FROM THE APPS, WHICH WAS INTEGRAL,
10 WHICH WAS INTEGRAL TO THEIR ENTIRE AD BUSINESS AS THEY TOLD
11 INVESTORS IN 2012, AND THAT'S IN PARAGRAPH 107.

12 SO IT'S A LITTLE DIFFERENT THAN HAVING AN AGREEMENT BUT NO
13 ACTUAL MONEY CHANGING HANDS AT THAT LEVEL, AT THAT UPSTREAM
14 LEVEL IN THE FTC V. QUALCOMM.

15 NOW, OF COURSE, YOUR HONOR, I DO HAVE AN OPINION THAT THE
16 NINTH CIRCUIT GOT IT WRONG, BUT OF COURSE WE'RE ALL BOUND BY
17 THAT DECISION.

18 BUT IF I TAKE THAT CASE ON ITS FACE, I THINK IT TURNED
19 ON -- I THINK IT TURNED ON THE ACTUAL EXCHANGE AND WHETHER
20 THERE WAS ACTUAL PURCHASES OR LICENSING GOING ON AT THE
21 APPROPRIATE LEVEL.

22 AND HERE WE DO -- WE ACTUALLY HAVE AN AFFIRMATIVE DECISION
23 NOT TO TAKE MONEY FROM THE -- TO DESTROY DEVELOPERS THAT WERE
24 PROFITABLE TO THEM, INTEGRAL TO THEIR ADVERTISING BUSINESS.

25 AND WHY? FOR -- IN ORDER TO GET RID OF ANY COMPETITIVE

1 APP THAT MIGHT ERODE THAT DATA TARGETING BARRIER TO ENTRY OR
2 KEEP THEM -- OR BECOME AN INDEPENDENT THREAT WITH THEIR OWN
3 CRITICAL MASS OF SOCIAL DATA.

4 NOW, WE HIT -- THE SECOND ELEMENT IS VERY CLOSE, TOO, AND
5 THAT'S THE PROFIT SACRIFICE ELEMENT. AND THE DECISION TO
6 DESTROY THOSE 40,000 DEVELOPERS, THEY DID IT AFTER BUCKETING
7 THEM INTO CATEGORIES ONE BY ONE.

8 AND THEN, YOUR HONOR, THEY DECIDED, WELL, IF YOU'RE
9 COMPETITIVE, WE'RE NOT ONLY GOING TO THROW YOU, EVENTUALLY
10 THROW YOU OFF THE PLATFORM, WE'RE NOT EVEN GOING TO LET YOU BUY
11 ADVERTISING AT FULL PRICE. PARAGRAPH 130, AS VERNAL EXPLAINS
12 TO LESSIN IN AUGUST 2012, WE ARE NOT GOING TO ALLOW THINGS
13 WHICH ARE COMPETITIVE TO BUY THIS DATA FROM US.

14 THE COURT: ALL RIGHT. I'M GOING TO ASK YOU TO WRAP
15 UP.

16 MR. BATHAE: I'M SORRY, YOUR HONOR.

17 THE COURT: THANK YOU.

18 MR. BATHAE: I DO VERY QUICKLY WANT TO POINT TO
19 PARAGRAPHS 177 THROUGH 180 OF THE COMPLAINT WHERE THE SENIOR
20 EXECUTIVES ACTUALLY DO SAY THERE'S A LACK OF LEGITIMATE
21 BUSINESS AND TECHNICAL JUSTIFICATION.

22 VERY QUICKLY ON THE THIRD ELEMENT, WHETHER IT'S
23 DISCRIMINATORY, WE SAY THAT INHERENTLY THE NATURE OF THE SCHEME
24 WAS DISCRIMINATORY. IT WAS TO LET SOME WINNERS IN EACH
25 CATEGORY PROCEED, BUT SOME SIMILARLY SITUATED PEOPLE,

1 TERMINATING THEIR ABILITY TO RUN ON THE PLATFORM, OR EVEN
2 ESSENTIALLY ADVERTISE BECAUSE THEY'RE NOT ON THE PLATFORM
3 ANYMORE.

4 SO I'LL POINT YOUR HONOR TO PARAGRAPH 155 WHERE INTERNALLY
5 PEOPLE WERE BALKING AT DISCRIMINATING BASED ON SIMILARLY
6 SITUATED APPS; PARAGRAPH 136 WITH THE CATEGORIZATION OF
7 SIMILARLY SITUATED APPS; AND, OF COURSE, YOUR HONOR,
8 PARAGRAPH 204 AND THE WHITELIST DECISION IN 162 ARE GOOD
9 EXAMPLES OF DISCRIMINATORY CONDUCT.

10 I APOLOGIZE IF I'M A BIT LONG WINDED, YOUR HONOR. IT'S A
11 VERY COMPLEX ISSUE. I DIDN'T MEAN TO TAKE TOO MUCH OF THE
12 COURT'S TIME.

13 THE COURT: NO NEED TO APOLOGIZE. I APPRECIATE IT.

14 I'M SORRY. I JUST HAVE MORE QUESTIONS. I WAS HOPING WE
15 COULD WRAP UP IN TWO HOURS. I DO NEED TO GIVE A BREAK TO THE
16 COURT REPORTER.

17 LET ME ASK, MS. SHORTRIDGE, WOULD YOU LIKE TO TAKE A BREAK
18 NOW? I PROBABLY HAVE ABOUT THREE MORE QUESTIONS.

19 THE REPORTER: WE CAN TAKE A BREAK NOW OR AFTER YOUR
20 NEXT QUESTION.

21 THE COURT: LET'S GO AHEAD AND TAKE A BREAK NOW
22 BECAUSE WE'VE BEEN GOING ALMOST, WHAT, AN HOUR AND 45 MINUTES,
23 I THINK, ALMOST.

24 ALL RIGHT. LET'S -- LET'S TAKE A TEN MINUTE BREAK NOW.

25 THANK YOU ALL VERY MUCH. THANK YOU FOR YOUR PATIENCE.

1 I'M SORRY, I DO HAVE A FEW MORE QUESTIONS, BUT WE WILL BE
2 WRAPPING UP SOON. THANK YOU.

3 THE CLERK: WE'RE IN RECESS.

4 (RECESS FROM 3:22 P.M. UNTIL 3:40 P.M.)

5 THE COURT: OKAY. OOPS.

6 ALL RIGHT. OH, LET ME GET MY CAMERA. OH, OKAY, IS IT
7 WORKING NOW? OKAY, GOOD.

8 ALL RIGHT. THANK YOU ALL FOR YOUR PATIENCE.

9 ALL RIGHT. LET ME GO TO MY REMAINING QUESTIONS.

10 JUST SO YOU KNOW, THIS IS WHAT I PLAN TO DO: I HAVE THREE
11 MORE QUESTIONS I'D LIKE TO ASK; I WOULD LIKE JUST SOME CLARITY
12 ON EXACTLY WHAT THE PLAINTIFFS ARE ASKING FOR WITH REGARD TO
13 INJUNCTIVE RELIEF, IF ANY; AND THEN I'M GOING TO GIVE EACH
14 PARTY TWO MINUTES, A CLOSING ARGUMENT, TO SAY WHATEVER YOU'D
15 LIKE TO SAY, AND THEN WE'LL END.

16 SO I'M HOPING WE SHOULD BE DONE MAYBE IN THE NEXT 20, 30
17 MINUTES. SO THANK YOU FOR YOUR PATIENCE.

18 LET'S GO TO WHOEVER WANTS TO ANSWER FOR THE CONSUMERS.
19 YOU SAY THAT YOUR ALLEGATIONS DON'T DEPEND ON A DUTY TO DEAL
20 BETWEEN FACEBOOK AND THIRD PARTY APP DEVELOPERS, AND I JUST
21 WANTED TO KNOW WHY THAT'S THE CASE.

22 MR. SWEDLOW: THE CONSUMER USER CLASS, IT JUST IS
23 IRRELEVANT FOR OUR CLAIM. OUR CLAIM IS BASED ENTIRELY -- YOU
24 KNOW, OUR FIRST AND ONLY BUCKET IS THE DECEPTIVE COLLECTION,
25 USE, SALE, AND DISTRIBUTION OF USER DATA, AND SO WHETHER OR NOT

1 FACEBOOK DEALS WITH ANYONE ELSE JUST ISN'T PART OF OUR CLAIM.

2 THE COURT: THE NEXT TWO QUESTIONS ARE FOR FACEBOOK.

3 I DON'T KNOW WHO WOULD LIKE TO ANSWER IT.

4 BUT JUDGE BOASBERG, WHILE HE DID SAY IT'S NOT UNLAWFUL FOR
5 AN ENTITY TO HAVE A POLICY LIKE THE API POLICY OF FACEBOOK'S,
6 HE DID SAY IT'S POSSIBLE THAT FACEBOOK'S IMPLEMENTATION OF THAT
7 API POLICY AS TO CERTAIN SPECIFIC COMPETITOR APPLICATIONS MAY
8 HAVE VIOLATED SECTION 2.

9 DO YOU HAVE A RESPONSE TO THAT? I MEAN, OBVIOUSLY WE'LL
10 HAVE TO WAIT AND SEE THE LEAVE TO AMEND AND WHAT -- YOU KNOW,
11 WE'LL HAVE TO WAIT TO SEE ANY AMENDED COMPLAINT AND SEE WHAT
12 THE ALLEGATIONS ARE, BUT --

13 MR. PANNER: YOUR HONOR, FOR WHAT IT'S WORTH, YOUR
14 HONOR, I DON'T THINK THAT THERE'S LEAVE TO AMEND WITH REGARD TO
15 THAT PART OF THE COMPLAINT.

16 THE COURT: OKAY.

17 MR. PANNER: THAT'S BEEN DISMISSED.

18 BUT I -- WHAT I'D LIKE TO STRESS IS THAT THERE'S REALLY NO
19 DAYLIGHT BETWEEN WHAT THE ADVERTISERS ALLEGE WITH REGARD TO A
20 POLICY AND WHAT WAS ALLEGED IN THE FTC AND STATE COMPLAINT.

21 BUT THE KEY POINT IS IF YOU -- IF YOU EVEN LISTEN TO WHAT
22 JUDGE BOASBERG SAID, OR READ WHAT HE SAID, HE EMPHASIZED THAT
23 THERE COULD BE SPECIFIC INSTANCES WHERE A PARTICULAR
24 IMPLEMENTATION WAS, WAS PROBLEMATIC. HE SAID THAT'S
25 THEORETICALLY POSSIBLE. HE CERTAINLY DIDN'T REACH IT OR FIND

1 THAT THERE HAD BEEN ANY SUCH.

2 AND WHAT HE SAID WAS WHEN IT COMES TO THE POLICY, IT
3 REALLY DOESN'T MATTER WHAT YOUR MOTIVATION IS. YOU ARE FREE TO
4 WITHHOLD -- YOU KNOW, GIVE ACCESS TO THE API'S, WITHHOLD ACCESS
5 TO THE API'S, THAT IS -- YOU'RE ENTIRELY FREE TO DO THAT. YOU
6 HAVE NO DUTY TO DEAL WITH THOSE OTHER APPS.

7 AND ALL THAT'S ALLEGED HERE IS THAT THERE WAS SUPPOSEDLY
8 DEALING WITH SOME LARGE NUMBER OF APPS, AND THEN FACEBOOK'S
9 POLICY CHANGED AND IT SAID WE'RE NOT GOING TO DO THAT.

10 AND SO THERE SIMPLY IS NO ALLEGATION OF SPECIFIC FACTS.

11 AND THEN IF YOU EVEN LOOK AT WHAT'S ALLEGED HERE, IT
12 DOESN'T COME CLOSE TO REACHING THE ELEMENTS THAT THE SUPREME
13 COURT IN TRINCO IDENTIFIED AS NECESSARY AND WHAT THE NINTH
14 CIRCUIT IN QUALCOMM IDENTIFIED AS NECESSARY TO MAKE OUT, YOU
15 KNOW, A VERY NARROW EXCEPTION TO THE NO DUTY TO DEAL RULE.

16 THERE'S NO PROPER ALLEGATION OF PROFIT SACRIFICE, THAT
17 FACEBOOK SOMEHOW SACRIFICED PROFITS BY CHANGING ITS, ITS
18 PLATFORM POLICIES. AND THE IDEA THAT FACEBOOK WOULD HAVE
19 SOME -- IN SOME, YOU KNOW, HYPOTHETICAL WORLD CHARGED FOR
20 ACCESS TO PLATFORM HARDLY FILLS THAT GAP. AND FACEBOOK -- SO
21 THERE'S NO, YOU KNOW, WITHDRAWAL FROM ANY VOLUNTARY COURSE OF
22 DEALING THAT WAS PROFITABLE OR ANY PROFIT SACRIFICED.

23 AND THERE'S SIMPLY NO ALLEGATION THAT THIS WAS A PRODUCT
24 THAT WAS MADE AVAILABLE GENERALLY TO RETAIL CUSTOMERS. IT
25 WASN'T A RETAIL PRODUCT AT ALL, AND SO THERE'S SIMPLY NO BASIS

1 WHATSOEVER FOR ANY KIND OF REFUSAL TO DEAL CLAIM IN THIS CASE.

2 AND, YOU KNOW, WHATEVER -- WHATEVER JUDGE BOASBERG MAY
3 HAVE LEFT OPEN AS A POSSIBILITY FOR SOME OTHER CASE ISN'T
4 REMOTELY PLED HERE.

5 THE COURT: WHAT ABOUT IN THE NEW YORK CASE -- AND
6 I'M NOT SURE IF YOU'RE GOING TO ANSWER THIS AS WELL,
7 MR. PANNER -- JUDGE BOASBERG FOUND THAT STATES HAVE STANDING TO
8 SUE ON BEHALF OF THEIR RESIDENTS. SO WHY WOULDN'T CONSUMERS
9 AND ADVERTISERS THEMSELVES HAVE STANDING TO SUE?

10 MR. PANNER: YOUR HONOR, I THINK THAT MS. MEHTA IS
11 GOING TO ADDRESS THE QUESTION OF ANTITRUST INJURY AND STANDING,
12 SO I'LL TURN THE MIC OVER TO HER.

13 MS. MEHTA: YES, YOUR HONOR, THANK YOU.

14 SO WITH RESPECT -- LET ME SEPARATE OUT THE USERS AND THE
15 ADVERTISERS FOR PURPOSES OF THAT QUESTION.

16 WITH RESPECT TO THE USERS, THE ANTITRUST INJURY HERE --
17 AND THIS IS NOT A THEORY THAT WAS ARTICULATED BY THE STATE
18 A.G.S -- THE THEORY THAT HAS BEEN ARTICULATED BY THE PLAINTIFFS
19 HERE IS THAT THE USERS ARE SOMEHOW INJURED BECAUSE THEY GAVE
20 TIME AND ATTENTION TO FACEBOOK, AND WHAT THEY HAVE NOT
21 ARTICULATED ANYWHERE IS A SINGLE CASE OR A SINGLE HOLDING IN
22 WHICH A COURT HAS FOUND THAT THAT WOULD SATISFY THE INJURY
23 REQUIREMENT FOR BUSINESS OR PROPERTY, INJURY TO BUSINESS OR
24 PROPERTY UNDER THE ANTITRUST LAWS.

25 THAT IS A DISTINCT ISSUE FROM WHAT JUDGE BOASBERG WAS

1 DEALING WITH IN THE STATE A.G. CASE, WHICH WAS WHETHER THERE'S
2 PARENS PATRIAE STANDING UNDER ARTICLE III.

3 THAT IS DISTINCT FROM THIS QUESTION. THIS IS AN ANTITRUST
4 INJURY QUESTION, AND THEY HAVE NOT CITED A SINGLE CASE TO
5 SUGGEST THAT THE THEORY THAT THEY ARE ARTICULATING IS
6 PLAUSIBLE, WHICH IS BECAUSE I TAKE A FREE PRODUCT AND I SPEND
7 TIME ON IT, SOMEHOW I'VE SUFFERED AN ECONOMIC INJURY, WHICH IS
8 WHAT IS REQUIRED FOR PURPOSES OF ANTITRUST INJURY, TOTALLY
9 DIFFERENT THAN THE PARENS PATRIAE ARTICLE III STANDING QUESTION
10 THAT JUDGE BOASBERG WAS RESPONDING TO.

11 AND THEN WITH RESPECT TO THE ADVERTISERS, THERE'S A
12 SEPARATE INJURY ISSUE WITH RESPECT TO THE ADVERTISERS, YOUR
13 HONOR, WHICH IS THEY ALLEGE THAT THEY'VE SUFFERED FROM
14 SUPRACOMPETITIVE PRICING, BUT -- I'M SORRY. LET ME BREAK THIS
15 DOWN.

16 THERE ARE TWO ANTITRUST INJURY ISSUES WITH RESPECT TO
17 ADVERTISERS, ONE ON A SECTION 2 CLAIM AND THEN ONE ON A
18 SECTION 1 CLAIM.

19 WITH RESPECT TO THE SECTION 2 CLAIM, THEY ALLEGE THAT
20 THEIR INJURY IS BASED ON SUPRACOMPETITIVE PRICING. BUT UNDER
21 JUDGE CHEN'S DECISION IN THE INTEL VERSUS FORTRESS GROUP CASE
22 FROM EARLIER THIS YEAR, THEY HAVE NOT PLED ANY FACTS THAT WOULD
23 MAKE THAT ALLEGATION PLAUSIBLE. THEY HAVE NOT PLED ANYTHING
24 ABOUT THE PRICES THEY PAID, WHY THOSE PRICES WOULD BE
25 SUPRACOMPETITIVE, AND THAT'S INSUFFICIENT UNDER JUDGE CHEN'S

1 DECISION IN FORTRESS.

2 SEPARATELY, THE ADVERTISERS' SECTION 1 CLAIM SUFFERS FROM
3 AN ANTITRUST INJURY PROBLEM, BUT THAT'S THE SAME PROBLEM, WHICH
4 IS THEY HAVE NOT ARTICULATED WHAT THE INJURY TO THE ADVERTISER
5 CLASS HERE IS FROM THE GOOGLE NETWORK BIDDING AGREEMENT AND THE
6 ALLEGED ANTICOMPETITIVE EFFECTS OF THAT SECTION 1 AGREEMENT
7 BETWEEN GOOGLE AND FACEBOOK, WHICH GOVERNS ANTI -- WHICH
8 GOVERNS AD PURCHASES ON THE GOOGLE EXCHANGE, WHICH IS
9 INDEPENDENT FROM THE AD PURCHASES ON THE FACEBOOK PLATFORM,
10 WHICH IS ALL THAT THEY'RE ALLEGING TO HAVE DONE FOR PURPOSES OF
11 THIS CASE. AND SO THERE'S A SEPARATE ANTITRUST INJURY CASE
12 ISSUE THERE.

13 THERE'S ALSO ESSENTIAL ENFORCER ISSUES AND OTHER ISSUES
14 WITH RESPECT TO THE GOOGLE NETWORK BIDDING AGREEMENT THAT WE GO
15 THROUGH IN OUR BRIEF, BUT I WON'T BELABOR THOSE UNLESS YOU HAVE
16 QUESTIONS ABOUT THOSE.

17 THE COURT: ALL RIGHT. THANK YOU.

18 LET ME ASK, ON THE INJUNCTIVE RELIEF, I'M NOW NOT REALLY
19 CLEAR ON WHAT EACH SET OF PLAINTIFFS IS REQUESTING. SO IF WE
20 CAN -- LET'S START WITH THE CONSUMER PLAINTIFFS. SO IF I LOOK
21 AT YOUR PRAYER FOR RELIEF, ARE YOU NOW WITHDRAWING SECTION B ON
22 PAGE 91? OR YOU'RE NOT? I'M JUST UNCLEAR. I GUESS IT SAYS
23 OTHER EQUITABLE RELIEF, ALTHOUGH I DON'T KNOW WHAT YOU
24 ENVISION.

25 DO YOU HAVE ANY GUIDANCE ON THAT?

1 MR. SWEDLOW: YES. I'M SORRY, I'M JUST SCROLLING
2 DOWN TO PAGE 91 TO MAKE SURE I'M --

3 THE COURT: AND I DIDN'T SEE, IN THE SUPPLEMENTAL
4 BRIEF, CONSUMERS ACTUALLY CHANGING WHAT YOU'RE REQUESTING. SO
5 MAYBE THIS IS REALLY JUST A QUESTION FOR THE ADVERTISERS.

6 MR. SWEDLOW: I DON'T THINK WE'RE CHANGING OUR
7 INJUNCTIVE RELIEF, INJUNCTIVE AND OTHER EQUITABLE RELIEF
8 REQUEST.

9 THE COURT: OKAY.

10 MR. SWEDLOW: I DON'T THINK IT -- I THINK IT'S TOO
11 EARLY IN THE CASE TO SAY WHAT INJUNCTIVE RELIEF WOULD BE
12 APPROPRIATE BECAUSE WE HAVEN'T PROVEN OUR CASE YET. I WILL
13 CONCEDE THAT TO FACEBOOK. WE'VE PLED OUR CASE.

14 SO I APOLOGIZE IF THIS IS -- IF IT'S AMORPHOUS RIGHT NOW,
15 BUT WE INCLUDED IT AS A PRAYER FOR RELIEF AND BELIEVE THAT WE
16 ADEQUATELY PLED THAT PRAYER.

17 BUT I DON'T THINK WE'RE ENTITLED TO INJUNCTIVE AND OTHER
18 EQUITABLE RELIEF UNTIL WE PROVE OUR CASE.

19 THE COURT: OKAY. THEN I PROBABLY SHOULD HAVE JUST
20 ADDRESSED THIS QUESTION TO THE ADVERTISERS, BECAUSE IN THE
21 SUPPLEMENTAL BRIEF, YOU HAVE ONE SENTENCE ON PAGE 5 THAT SAYS,
22 "BECAUSE ADVERTISERS DO NOT SEEK INJUNCTIVE RELIEF BASED ON THE
23 PLATFORM OR ACQUISITION CONDUCT ALLEGED BY THE STATES, THE
24 D.D.C.'S LACHES ANALYSIS IS IRRELEVANT."

25 SO IS THIS THE STATEMENT THAT, MR. BATHAEE, YOU WERE

1 REFERRING TO EARLIER -- ALTHOUGH I DON'T KNOW WHO'S GOING TO
2 ADDRESS THIS QUESTION, WHETHER IT'S YOU OR MS. ANDERSON -- IS
3 THAT THE STATEMENT THAT YOU WERE REFERRING TO EARLIER, THAT YOU
4 WERE WITHDRAWING SOME PRAYER FOR INJUNCTIVE RELIEF?

5 MR. BATHAEE: YES, YOUR HONOR, THAT'S THE STATEMENT
6 ON PAGE 5. WE -- WE ARE ONLY SEEKING TREBLE DAMAGES IN THIS
7 SUIT.

8 THE COURT: OKAY. SO IF I LOOK AT YOUR PRAYER FOR
9 RELIEF, WHICH IS ON PAGE 127, ARE YOU THEN WITHDRAWING REQUEST
10 F WHICH SAYS "GRANT PERMANENT INJUNCTIVE RELIEF PURSUANT TO
11 SECTION 16 OF THE CLAYTON ACT TO REMEDY THE ONGOING
12 ANTICOMPETITIVE EFFECTS OF DEFENDANT'S UNLAWFUL CONDUCT"? ARE
13 YOU WITHDRAWING ALL OF F, OR JUST PART OF F, OR CAN YOU PROVIDE
14 SOME GUIDANCE?

15 MR. BATHAEE: WE SEEK NO INJUNCTIVE RELIEF IN THIS
16 SUIT.

17 THE COURT: OKAY. SO THAT'S NOW GONE?

18 MR. BATHAEE: YES.

19 THE COURT: OKAY. ALL RIGHT. THANK YOU FOR THE
20 CLARIFICATION.

21 OKAY. FIRST OF ALL, I WANT TO THANK EVERYBODY FOR A VERY
22 HELPFUL HEARING. I APPRECIATE YOUR PATIENCE WITH ALL OF MY
23 QUESTIONS.

24 I'M NOW GOING TO GIVE EACH PARTY TWO MINUTES, AND THIS IS
25 GOING TO BE TIMED, AND I PERSONALLY THINK ADDRESSING THE TIME

1 BAR ISSUES WOULD BE PARTICULARLY HELPFUL.

2 BUT I AM GIVING YOU THE FLOOR FOR TWO MINUTES, SO IF YOU
3 WANT TO TALK ABOUT SOMETHING ELSE, YOU'RE WELCOME TO DO THAT.

4 SO LET'S JUST GO DOWN THE LINE. WHO WANTS TO GO FIRST?
5 TWO MINUTES, AND I'M JUST GOING TO TIME IT. YOU KNOW, IN TRIAL
6 I DO IT OFF THE REALTIME, BUT I DON'T HAVE THAT REALTIME
7 TRANSCRIPT RIGHT NOW, SO I CAN'T -- I'LL JUST HAVE TO USE THE
8 COMPUTER.

9 WHO WANTS TO GO FIRST?

10 MR. DUNNE: YOUR HONOR, I'M HAPPY TO GO FOR THE
11 ADVERTISERS.

12 THE COURT: OKAY. TIME IS 3:53. GO AHEAD, PLEASE.

13 MR. DUNNE: I'D LIKE TO ADDRESS THREE ISSUES VERY
14 QUICKLY.

15 THE FIRST IS ON TIMELINESS. WE THINK THAT FRAUDULENT
16 CONCEALMENT IS REALLY THE KEY HERE THAT ALLOWS US TO BE TIMELY
17 WITH REGARD TO THE FREEMAN DECISION IN REVEAL CHAT.

18 AS MR. BATHAEE ARGUED, WE BELIEVE THAT THE -- THAT THE
19 CONSTRUCTIVE KNOWLEDGE ANALYSIS IS INCORRECT, BUT ALSO UNDER
20 HER OWN OPINION, THAT THERE'S A DISTINCTION FOR THE TYPE OF
21 INJURY HERE AS AN OVERCHARGE.

22 SECONDLY, ON MARKET DEFINITION, I WANT TO BE CLEAR, OUR
23 MARKET DOES NOT SAY THAT THERE'S NO TARGETING BY OTHER TYPES OF
24 ADVERTISING. IN FACT, ALL ADVERTISING INHERENTLY TARGETS
25 PEOPLE.

1 THE ISSUE -- THE BASIC POINT IS THAT IT'S NOT REASONABLY
2 SUBSTITUTABLE THE TYPES OF TARGETING THAT ARE AVAILABLE BETWEEN
3 SOCIAL ADVERTISING AND DISPLAYING SEARCH ADVERTISING DURING THE
4 OVERCHARGE PERIOD, AND THAT AS THOSE TYPES OF TARGETING BECAME
5 POTENTIALLY CROSS SUBSTITUTABLE FOR CONSUMERS, THAT'S WHEN
6 FACEBOOK AND GOOGLE CUT A DEAL.

7 AND THE FINAL THING IS THAT IN PARAGRAPH 154 OF THE
8 COMPLAINT, THERE'S A GOOD -- THERE'S SOME GOOD ALLEGATIONS ON
9 THE REFUSAL TO DEAL.

10 AND THAT'S ALL FROM ADVERTISERS, YOUR HONOR. WE
11 APPRECIATE YOUR TIME.

12 THE COURT: ALL RIGHT. THANK YOU.

13 YOU ONLY USED A MINUTE.

14 MR. DUNNE: I THINK WE'RE FINE.

15 THE COURT: YOU'RE SATISFIED? ALL RIGHT. THANK YOU.
16 I APPRECIATE YOU USING LESS THAN THE TIME ALLOCATED.

17 OKAY. MS. MEHTA, YOU WANT TO GO?

18 MS. MEHTA: THANK YOU, YOUR HONOR, CERTAINLY.

19 THE COURT: BRIEFLY. GO AHEAD, PLEASE.

20 MS. MEHTA: THANK YOU, YOUR HONOR.

21 I WANT TO START BY TALKING ABOUT SOMETHING WE DIDN'T
22 ACTUALLY HAVE A CHANCE TO TALK ABOUT TODAY BECAUSE I THINK IT
23 FRAMES A LOT OF THE ISSUES, INCLUDING THE STATUTE OF
24 LIMITATIONS ISSUE, AND THAT IS THE CORE THEORY THAT THE USERS
25 ARE PRESENTING, WHICH IS A PRIVACY THEORY AND NOT AN ANTITRUST

1 CASE.

2 WHAT MATTERS IN AN ANTITRUST CASE IS THE EFFECT ON
3 COMPETITION. WHATEVER FACEBOOK IS ALLEGED TO HAVE DONE OR NOT
4 DONE WITH RESPECT TO ITS PRIVACY POLICIES, WHATEVER THE
5 SO-CALLED REVELATIONS ARE THAT MR. SWEDLOW WOULD WANT TO TALK
6 ABOUT, WHICH WE DON'T AGREE WITH THAT, BUT WHATEVER THOSE
7 ALLEGATIONS ARE, NONE OF THAT MAKES PLAUSIBLE THEIR CORE
8 THEORY, WHICH IS THAT COMPETITORS LIKE GOOGLE PLUS, MYSPACE,
9 SNAPCHAT, WHOEVER ELSE THAT WOULD FALL WITHIN THEIR MARKET
10 COULD NOT EFFECTIVELY COMPETE BY OFFERING THEIR OWN PRIVACY
11 PROTECTIVE PRODUCTS.

12 THAT IS THE FUNDAMENTAL THEORY THAT IS OFFERED BY THE
13 USERS AND IT IS THE FUNDAMENTAL PROBLEM WITH THEIR THEORY.

14 THEIR OWN COMPLAINT IDENTIFIES MYRIAD OTHER REASONS FOR
15 FACEBOOK'S SUCCESS AND DOES NOTHING TO EXPLAIN WHY THE SUPPOSED
16 PRIVACY DECEPTION THEORY, STATEMENTS WHICH ARE GENERAL AND FALL
17 FAR SHORT OF THE 9(B) STANDARD, WOULD ACTUALLY GIVE RISE TO AN
18 ANTITRUST CLAIM.

19 RELATED TO THAT, I WANT TO ADDRESS THE FRAUDULENT
20 CONCEALMENT AND THE TIMELINESS OF THOSE CLAIMS.

21 THE USERS' DECEPTION THEORY IS BASED ON EVENTS THAT GO
22 BACK AS FAR AS 2007, AND WHEN WE LOOK AT THE SPECIFIC
23 ALLEGATIONS, THERE'S NOTHING IN THOSE ALLEGATIONS THAT ACTUALLY
24 SAYS THAT WE -- THAT SUGGESTS THAT ANYTHING THAT WE SAID WAS
25 NOT TRUE AS TO THE SPECIFIC COMPLAINTS THEY'RE MAKING.

1 WE WERE UP FRONT ABOUT WHAT WE WERE GOING TO DO, WE'RE
2 GOING TO DO IT, AND THERE'S NOTHING IN THE PRIVACY ALLEGATIONS
3 THAT THEY'VE CLAIMED, OR THE SUPPOSED FRAUDULENT CONCEALMENT
4 ALLEGATIONS, THAT GO TO THE CORE THEORY IN THE CASE.

5 THE FINAL THING IS ANTITRUST INJURY. I'D ASK YOUR HONOR
6 TO TAKE A REALLY HARD LOOK AT THAT BECAUSE THIS IS A NOVEL
7 THEORY THAT'S NEVER BEEN PRESENTED BY ANYONE BEFORE AND NEVER
8 ACCEPTED BY ANY COURT.

9 AND THEN IN MY LAST FIVE SECONDS, I JUST WANT TO GIVE YOU
10 THREE CITATIONS. THERE ARE TWO, AT LEAST TWO CASES THAT I WAS
11 ABLE TO FIND JUST IN THE LAST HOUR IN WHICH THE DISTRICT COURT
12 HAS REJECTED FRAUDULENT CONCEALMENT ALLEGATIONS ON THE
13 PLEADINGS.

14 THE COURT: YOU'RE GOING INTO THREE MINUTES, BUT I'LL
15 LET YOU FINISH. BUT I WILL GIVE THE OTHER SIDE EQUAL TIME.

16 GO AHEAD, PLEASE.

17 MS. MEHTA: CERTAINLY. I JUST WANT TO GIVE YOUR
18 HONOR THE CITATION.

19 THE COURT: GO AHEAD, PLEASE.

20 MS. MEHTA: I APOLOGIZE. THIBODEAUX VERSUS TEAMSTERS
21 LOCAL 853 AT 263 F.SUPP 3D 722, THAT'S A 2017 N.D. CAL CASE;
22 MEDIOSTREAM VERSUS MICROSOFT --

23 THE COURT: OKAY. CAN I ASK YOU ONE QUICK QUESTION?
24 I'M SORRY TO INTERRUPT. ARE THESE CASES THAT ARE ALREADY IN
25 YOUR BRIEFS OR NEW CITES?

1 MS. MEHTA: NO, THESE ARE NEW CITES THAT RELATE TO
2 THE POINT THAT MR. BATHAEE MADE THAT COURTS DON'T DISMISS
3 CLAIMS ON FRAUDULENT CONCEALMENT AT THE PLEADING STAGE.

4 THE SECOND CITATION IS MEDIOSTREAM VERSUS MICROSOFT,
5 869 F.SUPP 2D AT 1095, THAT'S AN N.D. CAL CASE FROM 2012.

6 THOSE ARE JUST THE TWO I FOUND OVER THE COURSE OF THE
7 HEARING, AND THEN OF COURSE THERE'S JUDGE FREEMAN'S DECISION IN
8 REVEAL CHAT.

9 THE COURT: ALL RIGHT. THANK YOU.

10 MS. MEHTA: THANK YOU, YOUR HONOR.

11 THE COURT: ALL RIGHT. 3:58. ACTUALLY, YOU GOT FOUR
12 MINUTES.

13 MS. MEHTA: WELL, THERE'S TWO OF THEM.

14 THE COURT: I'M SORRY?

15 MS. MEHTA: I WAS JUST JOKING, YOUR HONOR. I WAS
16 JUST SAYING THERE ARE TWO ADVERTISERS.

17 THE COURT: NO, THAT'S FINE. THAT'S FINE.

18 LET ME ASK THE ADVERTISERS, YOU ONLY USED A MINUTE, AND
19 NOW IT'S GOING TO GO TO FOUR MINUTES. DO YOU WANT ANY
20 ADDITIONAL TIME, OR NOT?

21 MR. DUNNE: I'D LIKE 15 SECONDS, YOUR HONOR.

22 THE COURT: GO AHEAD, PLEASE.

23 MR. DUNNE: SO MS. MEHTA APPEARS TO HAVE
24 MISUNDERSTOOD WHAT MR. BATHAEE WAS SAYING, WHICH IS THAT WE
25 FOUND NO CASE OTHER THAN REVEAL CHAT IN WHICH A COURT FOUND A

1 FACTUAL INQUIRY MIGHT LEAD TO CONSTRUCTIVE NOTICE TO HAVE BEEN
2 SATISFIED AT THE PLEADINGS, NOT THAT NO CASE HAS EVER FOUND
3 THAT THERE CAN'T BE FRAUDULENT CONCEALMENT ON THE PLEADINGS,
4 BECAUSE OF COURSE THAT'S CERTAINLY TRUE.

5 SO THAT'S THE INQUIRY THAT WE WERE FRAMING UNDER CONMAR
6 AND OTHER CASES, THAT IT'S THE ACTUAL, RIGHT, IT'S THE ACTUAL
7 CONSTRUCTIVE KNOWLEDGE INQUIRY THAT'S FACT BASED.

8 AND WITH THAT, YOUR HONOR, THAT'S ALL WE HAVE.

9 THE COURT: OKAY. 3:58 TO 3:59.

10 ALL RIGHT. MR. SWEDLOW, YOU WANT TO GO FOR THE CONSUMERS?

11 MR. SWEDLOW: SURE.

12 THE COURT: ALL RIGHT. 3:59. GO AHEAD, PLEASE.

13 MR. SWEDLOW: I'M GOING TO TAKE OUT A CATEGORY
14 AGAINST YOUR SUGGESTION JUST BECAUSE OF THE WAY FACEBOOK
15 PRESENTED THEIR ARGUMENT, AND I'D LIKE TO ADDRESS OR AT LEAST
16 EXPLAIN WHAT OUR ANTITRUST STANDING AND INJURY ARGUMENT
17 ACTUALLY IS.

18 MS. MEHTA SAID THAT WE ARE SEEKING -- WE'RE ALLEGING THAT
19 OUR -- THAT THE TIME AND ATTENTION OF THE USERS IS THE INJURY
20 FOR PURPOSES OF STANDING.

21 BUT WE'RE -- THE KEY WORD WAS DROPPED OUT IN THE 100 PAGES
22 OF OUR COMPLAINT THAT TALK ABOUT DECEPTION RELATING TO USER
23 DATA JUST WASN'T MENTIONED.

24 THE ANTITRUST INJURY AND THE ANTITRUST STANDING ARE BASED
25 UPON THE FACT THAT FACEBOOK DECEIVED, LIED, AND STOLE USER

1 DATA.

2 WITHIN THE MODERN ECONOMY, ENTITIES PAY FOR USER DATA.
3 THE WAY FACEBOOK PAYS FOR USER DATA IS TO PROVIDE A SERVICE AND
4 PRODUCT THAT USERS WANT.

5 THEY ALSO INVEST TIME AND ATTENTION, BUT WHAT WAS DECEIVED
6 AND STOLEN HERE -- WHAT WAS STOLEN THROUGH DECEPTION HERE IS
7 THE DATA AND THE EXTENSIVE USE OF THE DATA.

8 WHAT -- I WOULD DIRECT YOU TO PARAGRAPH 224 WHICH TALKS
9 ABOUT WHAT FACEBOOK RESORTED TO WHEN IT COULD NO LONGER STEAL
10 THE DATA THROUGH THE APP THAT IT GOT CAUGHT USING FOR THAT
11 PURPOSE, AND FACEBOOK STARTED OFFERING \$20 A MONTH TO BUY
12 PEOPLE'S DATA. SO THIS THING THAT FACEBOOK STOLE THROUGH
13 DECEPTION IS VALUABLE.

14 THE SUPREME COURT ESTABLISHED IN 1979 IN REITER VS.
15 SONOTONE, I THINK, 442 U.S. 330, THAT ANTITRUST STANDING OR
16 HARM TO PROPERTY IS BROAD AND INCLUSIVE AND COMPREHENDS
17 ANYTHING OF MATERIAL VALUE OWNED OR POSSESSED.

18 SO WHAT WAS TAKEN HAD VALUE. USER DATA HAS VALUE. IT'S
19 ACTUALLY PRECIOUS. PARAGRAPH 109 IDENTIFIES IT AS THE SECRET
20 SAUCE. IT'S THE WAY FACEBOOK BECAME FACEBOOK IS THAT IT COULD
21 ACCESS THAT DATA, MONETIZE IT, SELL IT, AND USE IT FOR UNIQUE
22 AND VERY EXTENSIVE ADVERTISING.

23 THAT'S SEPARATE FROM THE OTHER ISSUE, WHICH IS ANTITRUST
24 INJURY. FACEBOOK HARMED COMPETITION BECAUSE IT WASN'T PAYING
25 FOR THE DATA OR THE RAW MATERIALS THAT IT TOOK FROM USERS.

1 IT ALSO DIDN'T HAVE TO ACTUALLY IMPROVE THE QUALITY OF THE
2 SERVICE THAT IT OFFERED TO KEEP USERS BECAUSE IT WASN'T PAYING
3 FOR THE DATA THAT IT WAS TAKING FROM THOSE USERS WITHOUT
4 COMPENSATION.

5 AND THEN THE THIRD THING, WHICH IS THE LARGER PART OF THE
6 BUCKET, IS THAT FACEBOOK ELIMINATED THE COMPETITION BY UNFAIRLY
7 COMPETING WITH THAT DATA, AND THAT'S SORT OF THE METHOD BY
8 WHICH FACEBOOK PROFITED AND HARMED COMPETITION THROUGH THE
9 DECEPTION.

10 BUT THIS ISN'T SOME UNIQUE THEORY. THIS IS THE THEORY.

11 TURNING TO, TO THE OTHER PART, WHICH IS THE TIME BAR OR
12 STATUTE OF LIMITATIONS, IF PLAINTIFFS GET TO DECEMBER OF 2016
13 UNDER THE STATUTE OF LIMITATIONS, WE THEN HAVE FOUR YEARS TO
14 FILE OUR CLAIM, WHICH IS WHAT WE DID.

15 FACEBOOK SAID THAT THEY WERE UP FRONT ABOUT EVERYTHING
16 THAT THEY DID.

17 THAT SIMPLY ISN'T BELIEVABLE OR PLAUSIBLE.

18 CAMBRIDGE ANALYTICA WAS A GIANT REVELATION. IT WASN'T MY
19 REVELATION. I DIDN'T FIND IT OUT. D.O.J. DIDN'T SUE FACEBOOK
20 FOR LYING ABOUT ITS PRIOR FTC CONSENT DECREE. FACEBOOK DIDN'T
21 PAY \$5 BILLION BECAUSE IT WAS TOTALLY UP FRONT ABOUT WHAT IT
22 DID. THE U.K. DIDN'T INVESTIGATE THEM AND DETERMINE NOBODY
23 COULD HAVE KNOWN WHAT FACEBOOK WAS DOING.

24 THE COURT: CAN I ASK YOU A QUESTION? WHAT IS YOUR
25 ANSWER THAT THIS IS REALLY A PRIVACY CASE? I GUESS YOUR ANSWER

1 IS STILL THE SAME AS WHAT YOU'VE ALREADY SAID.

2 MR. SWEDLOW: IT ISN'T A PRIVACY CASE, BUT THE
3 DECEPTION RELATES TO PRIVACY.

4 WHAT FACEBOOK KNOWS, AND WE -- AND IT'S NOW REVEALED -- IS
5 THAT PEOPLE FEELING SAFE AND SECURE ABOUT THEIR DATA AND USING
6 IT ON FACEBOOK IS THE SECRET SAUCE OF FACEBOOK.

7 WHAT FACEBOOK DID -- IT'S NOT A PRIVACY CASE BECAUSE WHAT
8 FACEBOOK DID WAS HARM COMPETITION BY DECEPTIVELY TAKING
9 PEOPLE'S DATA AND USING IT IN AN ANTICOMPETITIVE WAY.

10 SO FACEBOOK WOULD LIKE TO CALL IT A PRIVACY CASE, BUT IT'S
11 AN ANTITRUST CASE WHERE THE PLAINTIFF CLASS HAS ANTITRUST
12 STANDING, AND WE'VE ADEQUATELY ALLEGED ANTITRUST INJURY. IT
13 JUST ISN'T A PRIVACY CASE BECAUSE THE DECEPTION RELATES TO
14 PRIVACY. THEY SIMPLY CAN'T MAKE US PLEAD IT THE WAY THAT THEY
15 WOULD LIKE IT TO BE PLED.

16 THE COURT: I SEE. ALL RIGHT. IT'S 4:03. THAT WAS
17 FOUR MINUTES.

18 OKAY. THANK YOU ALL.

19 OH, MS. MEHTA, DID YOU WANT TO SAY SOMETHING?

20 MS. MEHTA: I WANTED TO TAKE TEN SECONDS, BUT ONLY IF
21 YOUR HONOR WILL GIVE IT TO ME.

22 THE COURT: GO AHEAD. GO AHEAD.

23 MS. MEHTA: THANK YOU.

24 I WANT TO BE REALLY CLEAR ABOUT SOMETHING. IT'S NOT A
25 PRIVACY -- A PRIVACY CASE DOESN'T BECOME AN ANTITRUST CASE

1 BECAUSE MR. SWEDLOW SAID SOMETHING.

2 WHEN I SAID WE WERE UP FRONT ABOUT THINGS, THE CORE THEORY
3 IS THAT SOMEHOW THE USAGE OF USER DATA TO TARGET ADVERTISING IS
4 ANTICOMPETITIVE.

5 THAT IS SOMETHING THAT PEOPLE HAVE KNOWN FOR A LONG TIME.
6 FACEBOOK HAS NOT BEEN ALLEGED HERE, AND THERE'S NOTHING IN
7 THEIR COMPLAINT TO SUGGEST THAT FACEBOOK EVER SAID WE WON'T USE
8 DATA TO TARGET ADVERTISING IN THE SAME WAY THAT SEARCH ENGINES
9 AND OTHER TECHNOLOGY COMPANIES DO. THAT WAS MY POINT.

10 WHAT MR. SWEDLOW STILL HAS NOT IDENTIFIED IS A SINGLE CASE
11 TO SUPPORT THEIR ANTITRUST INJURY THEORY, OR TO SUPPORT THE
12 DECEPTION THEORY, WHICH EVEN IF YOU TAKE ALL THEIR ALLEGATIONS
13 AT FACE VALUE, TO SOMEHOW MAKE CREDIBLE THE THEORY THAT ALL OF
14 THESE SUPPOSED STATEMENTS ABOUT PRIVACY MEANT THAT COMPANIES
15 LIKE GOOGLE COULDN'T COMPETE IN THE RELEVANT MARKETS, THERE'S A
16 FUNDAMENTAL PROBLEM WITH THAT THEORY. IT DOESN'T MAKE ANY
17 SENSE.

18 THE COURT: ALL RIGHT. I'M GOING TO LET MR. SWEDLOW
19 RESPOND ALSO FOR --

20 MR. SWEDLOW: I'LL TRY TO GO FOR -- IF THAT WAS TEN
21 SECONDS, I'LL GO FOR THAT SAME TEN SECONDS.

22 FACEBOOK WOULD LIKE OUR ALLEGATIONS TO BE DIFFERENT THAN
23 THEY ARE, FOR EXAMPLE, WE'RE NOT ACTUALLY ALLEGING THE INJURIES
24 RELATED TO TIME AND ATTENTION, AND WE'RE NOT ACTUALLY ALLEGING
25 THAT THE LAWFUL USE OF DATA TO PROVIDE TARGETED ADVERTISING WAS

1 DECEPTIVE OR ANTICOMPETITIVE.

2 THAT'S WHAT FACEBOOK SAID IT WAS GOING TO DO. FACEBOOK
3 DID THAT AND THAT'S LEGAL.

4 WHAT FACEBOOK ALSO DID WITH ITS ILLEGALLY OBTAINED DATA
5 AND DATA THAT WAS NOT DISCLOSED AS BEING COLLECTED AND USED AND
6 SOLD IS UNLAWFULLY COMPETE BY KEEPING USERS AND MAINTAINING
7 MARKET DOMINANCE BY ELIMINATING COMPETITION AND BY NOT HAVING
8 TO PROVIDE A BETTER PRODUCT TO KEEP USERS ENGAGED.

9 IT ISN'T THE LAWFUL USE OF THE DATA THAT WAS THE ACTUAL
10 DEAL WITH USERS.

11 IT'S THE UNLAWFUL COLLECTION AND USE OF THE DATA THAT
12 COULDN'T HAVE BEEN KNOWN UNTIL MARCH OF 2018 WHEN ALL OF THIS
13 CAME TO LIGHT. THAT'S -- IT'S SIMPLY WE'RE NOT TARGETING THE
14 LEGAL USE OF DATA OR THE DEAL THAT USERS ACTUALLY ENTERED INTO
15 WITH FACEBOOK. THAT'S FACEBOOK'S LEGAL BUSINESS.

16 IT'S THE ANTICOMPETITIVE PORTION OF THEIR BUSINESS BASED
17 ON DECEPTION.

18 THE COURT: ALL RIGHT.

19 I WANT TO THANK YOU ALL VERY MUCH. THIS WAS EXTREMELY
20 HELPFUL, AND THANK YOU FOR YOUR PATIENCE WITH ALL OF MY
21 QUESTIONS.

22 ALL RIGHT. THANK YOU ALL. TAKE CARE.

23 MS. MEHTA: THANK YOU, YOUR HONOR.

24 THE COURT: THANK YOU. BYE-BYE.

25 MR. SWEDLOW: THANK YOU, YOUR HONOR.

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MR. BATHAEE: THANK YOU, YOUR HONOR.

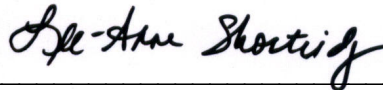
THE CLERK: THANK YOU. COURT IS ADJOURNED.

(THE PROCEEDINGS WERE CONCLUDED AT 4:06 P.M.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF ZOOM PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: JULY 26, 2021